Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term 1995

Seattle Lake Shore and Eastern Railroad, Inc.,
petitioner,

v.

Interstate Commerce Commission,
United States Of America,
respondent.

Petition For Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the ICC and the court panel below act contrary to the precedence of *Sharp v. U.S.*, 91 U.S. 341 (1903) in allowing an unaccepted offer to establish fair market value of the abandoned rail properties? U.S. Supreme Court Rule 10.1(c).

2. Did the Interstate Commerce Commission (ICC) abrogate their statutorial responsibility to the National Rail Transportation Policy pursuant to 49 U.S. 10101a, by allowing non-rail use in abandoned rail corridor instead of allowing continued rail use by a qualified carrier?

3. Did the ICC and the lower court not allow the nominal financial assistance offer of petitioner directly against the precedence set in *Iowa Terminal Railroad v. ICC*, 853 F.2d 965 (1988)? U.S. Supreme Court Rule 10.1(a).

4. Did the ICC act inconsistent with 49 U.S.C. 10905(c) and (d) and, arbitrarily and capriciously reject an offer of financial assistance for continued operation of a rail line on grounds that petitioner's nominal offer for financial assistance was invalid because outside, non-rail, third parties made unaccepted offers in excess of petitioner's bid for continued rail service when the third parties unaccepted offers were for recreational use not continued rail use?

PARTIES TO THE PROCEEDING

The Petitioner is the Seattle Lake Shore And Eastern Railroad, Inc., who was a petitioner before the Interstate Commerce Commission, and the Appellant before the U.S. Court of Appeals for the D.C. Circuit.

The Respondent is the Interstate Commerce Commission and the United States of America.

The city of Seattle, Washington, and the Rails To Trails Conservancy, a private corporation, and Burlington Northern Railroad, Inc., a private corporation are Intervenors.

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SEATTLE LAKE SHORE AND EASTERN RAILROAD, INC.
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INTERSTATE COMMERCE COMMISSION,
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Petition For Writ Of Certiorari
To The U.S. Court Of Appeals D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Seattle Lake Shore and Eastern Railroad, Inc., Petitions for a Writ Of Certiorari to review the decision of the U.S. Court of Appeals for the D.C. Circuit, filed on May 10, 1995 and rehearing denial filed July 3, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit in *Seattle Lake Shore and Eastern Railroad. Inc. v. I.C.C.* Docket No. 94-1341 is an unreported per curiam decision dated May 10, 1995. App-A1

Rehearing suggestion before the United States Court of Appeals for the D.C. Circuit was denied in an unreported per curiam decision dated July 3, 1995. App-B1

Lake Union Terminal Railroad Company v. I.C.C. Docket No. 94-1456 was consolidated with Docket No. 94-1341 above. Petitioners in Docket No. 94-1456 have declined to request Writ of Certiorari to the United States Supreme Court.

The Decision of the Interstate Commerce Commission in Docket No. AB (Sub. No. 357X) *Burlington Northern Railroad Company-Abandonment Exemption-in King County, Washington*, decided April 21, 1994 (not printed). App-C1

The Decision of the Interstate Commerce Commission, Director, Office of Proceedings, in Docket No. AB-6 (Sub. No. 537X) decided March 16, 1994 (not printed). App-D1

JURISDICTION

The Decision of the District of Columbia Court of Appeals (App-A1) was entered on May 10. 1995 and the Petition for Rehearing was denied on July 3, 1995 (App-B1). The jurisdiction of the U.S. Court of Appeals of the D.C. Circuit was 28 U.S.C. 2341, 2342, 2344 (Hobbs Act). Venue was 28 U.S.C. 2343.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1988);

The Petitioner has 90 days from July 3, 1995 to request Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Interstate Commerce Commission (ICC) has the authority under 49 U.S.C. 10101a, P.L. 96-448, to carry out the national rail transportation policy of the United States:

> "In regulating the railroad industry, it is the policy of the United States Government . . . .
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carrier and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economics in transportation and to ensure effective competition and coordination between rail carriers and other modes;" . . . .

The ICC has the authority under 49 U.S.C. 10903, P.L. 95-473, to issue certificates of abandonment for portions of railroad rights-of-way:

"(b)(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission . . . .
(c) Except as provided in sections 10905 and 10906 of this title . . . ."

The ICC has authority under 49 U.S.C. 10905, P.L. 96-448, to establish the conditions and the amount of compensation for either a subsidy for continued rail service or an offer of financial assistance (OFA) for a new carrier to take over the line:

"(c) . . . .If the offer to subsidize or offer to purchase is less than the carrier's estimate provided under section (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated."

STATEMENT OF THE CASE

Procedural History and Nature of the Case

The jurisdiction of the U.S. Court of Appeals of the D.C. Circuit was 28 U.S.C. 2341, 2342, 2344 (Hobbs Act). Venue was 28 U.S.C. 2343. This Court should be aware that the decisions below were joint decisions consolidated originally by the ICC and accepted by the D.C. Circuit as a consolidated case. Two separate short line carriers were attempting to acquire separate portions of the soon to be abandoned rail line in question. The present petitioner, Seattle Lake Shore and Eastern Railroad, Inc. (SLSE) is acquiring the first 2000 feet of the abandonment. The Lake Union Terminal Railroad Company (LUT) was attempting to acquire the remaining 3 miles. LUT has decided

not to seek a Writ of Certiorari to the United States Supreme Court so SLSE is the only remaining petitioner to this Court.

Petitioner, Seattle Lake Shore and Eastern Railroad. Inc., (SLSE) is a start-up short line carrier attempting to acquire a 2000 foot stretch of abandoned rail line in King County, Washington. Burlington Northern Railroad petitioned the ICC to abandon the line in late 1993, 49 U.S.C. 10505. SLSE made a timely offer of financial assistance (OFA) pursuant to 49 U.S.C. 10905 and C.F.R. 1152.27 et seq., see App-E1.

SLSE's OFA was for a nominal sum ($10) as petitioner determined the abandoning railroad had no fee title to the right-of-way and the salvage cost of the rails and ties equaled or exceeded the salvage value of the rails and ties. Consequently, petitioner offered a nominal amount for the abandoned right-of-way in order to continue rail service, see App-E1.

After SLSE submitted its OFA to the ICC and the statutorial time limit for OFAs had expired (49 U.S.C. 10905(c)), an offer of $175,000 was submitted to the ICC for non-rail use, ostensibly for recreational trail use, see App-F1. The $175,000 offer was unaccepted by the railroad and the offer expired by its own terms. The ICC then used the $175,000 figure as the minimum acceptable fair market value of the rail line. Petitioner timely objected to the ICC using the $175,000 figure.

On March 16, 1994, the ICC Director of Office of Proceedings ruled against SLSE's OFA stating SLSE was not *bona fide*, see App-D1. Petitioner timely appealed that decision. On April 22, 1994 the full ICC denied petitioner's appeal of the Director of Office of Proceedings and the Commission further stated the $175.000 figure was the minimum fair market value for the rail line, see App-C1-10. Petitioner made a timely appeal to the U.S. Court of Appeals for the District of Columbia Circuit, 28 U.S.C. 2342, 2343, 2344. On May 10, 1995, the DC Circuit affirmed the ICC decision, see App-A1. A timely rehearing was requested and was denied by the D.C. Circuit panel on July 3, 1995, see App-B1.

Petitioner seeks review of the DC Circuit decision because certain U.S. Supreme Court and federal circuit cases have not been adhered

to in the ICC decision that was affirmed by the D.C. Circuit, *Sharp v. U.S.*, 191 U.S. 341 (1903) and *Iowa Terminal R. Co. v. ICC*, 853 F.2d 965 (1988), and because it is in conflict with the existing national rail transportation policy, 49 U.S.C. 10101a, see U.S. Supreme Court Rule 10.1.(a) and (c).

Facts

In 1993, Burlington Northern Railroad (BN) decided to abandon their Lake Union Branch line in King County, Washington, and on October 1, 1993 petitioned the ICC for an Exemption of Abandonment, 49 U.S.C. 10505. On February 3, 1994, The ICC granted the Exemption of Abandonment pursuant to 49 U.S.C. 10505. On February 11, 1994, SLSE timely filed a formal expression of intent to file an OFA, 49 U.S.C. 10905 and 49 C.F.R. 1152.27 et seq. On March 10, 1994, SLSE timely filed its OFA for the nominal sum of $10.00, 49 C.F.R. 1152.27(c)(1) and 1152.27(c)(1)(i), see App-E1. SLSE's OFA explained the offer was for $10.00 because SLSE's outside expert legal counsel determined that BN did not have fee title to the right-of-way SLSE was acquiring and the rails and ties would cost more to salvage then their salvage value was worth; consequently, the $10.00 OFA. BN agreed that the rail and tie salvage value was nominal.

On March 14,1994, after SLSE made its offer and beyond the statutorial time limit for OFAs, a third party non-rail entity, Rails To Trails Conservancy (RTC) wrote the ICC a letter stating they would offer $175,000 for BN's interest for recreational trail use, see App-F-3. RTC stated that their offer was for more than the combined cash of the two then acquiring carriers. The Court should note the RTC offer expired by its own terms and was not accepted by BN (an unaccepted offer).

The Director of Office of Proceedings of the ICC ruled SLSE not *bona fide*, 49 U.S.C. 10905(d), on March 16, 1995. The Director stated that SLSE did not explain the disparity of its offer with the evidence of value submitted by BN, even though BN did not submit a minimum purchase price as required by 49 C.F.R. 1152.27(a)(1) and 1152.27(c)(1)(iii), see App-D-7. SLSE did in fact submit expert opinion that the right-of-way on the 2000 feet that SLSE was acquiring was easement land and thus had no marketable value to BN after abandonment. BN conceded that the rails and ties had no

residual value after abandonment. Nevertheless, the full ICC ruled that BN had marketable title to the 2000 foot right-of-way, see App-C-11 thru 13.

The DC Circuit in their May 10, 1995, Judgment affirmed the ICC decision allowing the $175,000 unaccepted offer to set the minimum price for an OFA: "The Interstate Commerce Commission reasonably concluded, based upon the written Rails to Trails Conservancy offer of $175,000 for both parts of the line. . .", App-A-1. Petitioner reminds the Court that at the time of the ICC decision and the D.C. Circuit affirmation, both short lines (SLSE and LUT) were in the decisions, but they were never separated for net liquidation value sake by the ICC or the lower court. There are two distinct ownership issues on the respective rights-of-way between the two short line carriers (LUT, the other short line is not on this Writ of Certiorari).

The right-of-way on SLSE's acquisition consists of only two parcels of land, Parcel 64 and 66 on BN's Valuation Map. BN and the ICC concede that parcel 64 (the Burke Deed) is reversionary and has no value for net liquidation purposes (App-C-12), but Parcel 66 (the Ross Deed) is where the dispute lies. Petitioner's outside expert legal counsel gave the opinion that the language of the Ross Deed did in fact make the deed reversionary according to Washington State law. BN's outside legal counsel took the opposite position. The ICC admitted the Ross Deed was ambiguous, but the ICC still ruled against petitioner, see App-C-14.

The Financial Assistance Scheme

The long standing ICC criteria for an OFA is the acquiring carrier will pay net liquidation value for the line. Net liquidation value has been determined to be the value of marketable title land plus net salvage value of rails and ties, *Chicago Northwestern Co. v. U.S.*, 678 F.2d 665 and also 49 C.F.R. 1152.27(f)(6). Marketable title has been determined previously by the ICC to be either a warranty or quit claim deed with no restrictions to title in the deed, *Central Michigan Railway*

Company--Abandonment--East of Iona to West Owosso--in Michigan, in Docket AB-308 (Sub. No. 1) (not printed), Oct. 4, 1991.

ARGUMENT OF CASE

I. THE ICC's DECISION AND LOWER COURT AFFIRMATION WAS CONTRARY TO THE LONG ESTABLISHED PRECEDENCE OF *SHARP v. U.S.*, 191 U.S. 341 (1903), BY ALLOWING "MERE" UNACCEPTED OFFERS TO ESTABLISHED FAIR MARKET VALUE FOR NET LIQUIDATION VALUE IN A QUASI-EMINENT DOMAIN ACTION.

The ICC wrote the main theme of their decision on the basis of a $175,000 "mere" offer, an unaccepted offer at that, see App-C-10 thru 14. The D.C. Circuit affirmed on that basis, see App-A-1. The $175,000 offer was contained in a four page letter, see App-F-3, from Charles Montange, allegedly representing the Rails to Trails Conservancy, to the ICC. The letter proffered numerous comments about petitioner, and at the top of page three made a very restrictive offer of $175,000; subject to environmental assessment for toxic conditions on the line, terms, other unspecified conditions, and an expiration date. There was no consideration expressed and the offer expired unaccepted. Yet the ICC took this "mere" unaccepted offer as the basis for setting the net liquidation value of the right-of-way, see App-C-10.

The $175,000 was made after petitioner's offer and beyond the time limit of 49 U.S.C. 10905 OFAs and contrary to *Sharp*, supra, also see 25 ALR 4, 571 *Unaccepted Offer for Purchase of Real Property as Evidence of Its Value* and 25 ALR 4, 615 *Property Value-Comparable Property*. The RTC offer was made outside the statutorial time limits for OFA offers, 49 C.F.R. 1152.27(c)(1)(ii).

The seminal case on this issue is *Sharp v. U.S.*, 191 U.S., 341, (1903). *Sharp* is very clear that unaccepted offers are not acceptable for setting fair market value for eminent domain purposes, at page 343 and headnotes 1 and 2. *Sharp* has been cited for this theory almost 100 times in 92 years. Also see, *U.S. v. 10.031 Acres of Land in Las Animas Cty., Colo.*, 850 F.2d 634,637 (1988), *Matter of Valuations Proceedings. etc.*, 531 F.S. 1191, Special Court by Judge Friendly, (1983), *U.S. v. Regents of NM School of Mines*, 185 F.2d 389 (1950), *Emerald Oil Co. v. Comm. of IRS*, 72 F.2d 681, 683, (1934).

The ICC has said their proceedings are not eminent domain cases, see Respondents joint brief at page 24, but both *Chicago Northwestern Transp. Co.*, at 668, supra, and *Iowa Terminal*, at 969, supra, refer to OFA's as a "taking" and the ICC as the agent for the eminent domain proceeding against abandoning railroads. The ICC now has the unmitigated gall to refer to section 10905 proceedings as condemnation proceedings, see *Wyoming & Colorado RR. Co., Inc.,--Abandonment Exemption--Jackson County, Co.*, dated September 15, 1995, at page 1 and 2, when just 5 months ago in their joint brief in the instant case the ICC argued section 10905 proceedings were not in eminent domain. It appears the government wants it both ways, but the case law is clear that section 10905 proceedings involve eminent domain. So *Sharp* and its progeny are valid precedence for 10905 proceedings.

There is no reason why unaccepted offers, which are inadmissible on value in every other context, should be admissible under 49 U.S.C. 10905 OFA offers. In some jurisdictions, unaccepted offers are admissible upon a showing of good faith, however, such offers are inadmissible when they are made subsequent to the condemnation petition, as was RTC's offer in the instant case, see 55 ALR 2d 781.

Justice Peckham writing for the *Sharp* Court was quite clear on the Court's reasoning why unaccepted offers could not be used to set fair market value:

> "It (unaccepted offer) is at most, a species of indirect evidence of the opinion of the person making the offer as to the value of the land. . . .He may have wanted the land for some particular purpose disconnected from its value. . . .There is no opportunity to cross-examine the person making the offer, to show these various facts. . . .To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. . . .Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value."

(emphasis supplied), pages 348-349.

I cannot think of a more direct match for the facts of the instant case and the writings of Justice Peckham in *Sharp*. RTC's offer was a "mere" offer. RTC was never required by the ICC to show if their offer had any basis for valuation purposes. RTC even admits that their offer was for a dollar amount slightly more that the acquiring carriers had as known assets, see App-F-3. Also, the ICC did not make RTC show that it had the funds available to make good on its offer although the ICC ruled against SLSE being *bona fide* because SLSE had only $48,000 in assets. At least SLSE had funds where as RTC never showed assets or were even asked by the ICC to show assets.

Washington State law has followed *Sharp* from day one, see *North Coast Railroad Co. v. Newman*, 66 Wn. 374, 119 P. 823 (1911) and *Chicago Milwaukee St. Paul & P. R. Co. v. Alexander*, 47 Wn. 131, 91 P. 626 (1907). Both of these cases stand for the proposition that offers to buy and offers to sell property are not evidence of value and should be disregarded in determining fair market value. Washington State Pattern Jury Instruction, WPI 151.0, instructs juries in eminent domain cases on this exact point--to disregard offers to buy or sell as evidence of fair market value.

Also, Washington State Pattern Jury instruction, WPI 151.13, instructs juries to disregard previous sales of the condemning government entity when determining fair market value, see *Medina v. Cook*, 69 Wn.2d 574, 418 P.2d 1020 (1966) and *Port of Seattle v. Blatz*, 59 Wn.2d 55, 365 P.2d 779 (1991). Also see 85 ALR 2d 163.

In both the ICC decisions in this case plus in the D.C. Circuit affirmation of those decisions, the main argument was the RTC offer of $175,000 set the minimum sales price, but now within the past two weeks the ICC has said that they will not use offers made during the OFA process to set the minimum sales value for an OFA,:

> ". . . . We do not wish to determine the NLV (net liquidation value) based on an offer made in the knowledge that the offeror would not actually have to pay the purchase price. The opportunity for receiving inflated offers as evidence of NLV is too great for us to adopt such a practice. . . ."

Wyoming & Colorado, supra at page 7.

It is clear that the ICC was totally wrong to use the RTC offer to set the minimum price for petitioners acquisition of the right-of-way. It appears that the ICC has seen the error of its ways in the *Wyoming & Colorado*, so it will be up to the U.S. Supreme Court to correct this error.

Accordingly, *Sharp* is fully applicable here and invalidates the D.C. Circuit's panel and the ICC's decisions, see U.S. Supreme Court Rule 10.1(c). Unless the panel's decision is harmonized with *Sharp*, serious consequences are likely to follow that would undermine the *Sharp* decision and Congressional intent behind 49 U.S.C. 10905 and 10101a that local interests provide continued rail service over abandoned lines. Congressional intent and ICC policy states continued rail use under 10905 is to take priority over trail use, see 16 U.S.C. 1247(d) and *Rail Abandonments-Use of Right-of-Way as Trails*, 2 I.C.C. 2d 591, 608 (1986).

But as the present case illustrates, trail advocates can reverse the priority by submitting inflated offers not intended to be accepted, after commencement of 10905 proceedings, and are beyond the financial means of most short line operators.

The U.S. Supreme Court needs to invalidate the ICC's decision to protect the *Sharp* precedence, see U.S. Supreme Court Rule 10.1(c).

II. THE ICC's DEROGATION OF CERTAIN ASPECTS OF THE NATIONAL RAIL TRANSPORTATION POLICY AS OUTLINED IN 49 U.S.C. 10101a.

The decision below, which affirmed the ICC decision, is in conflict with certain parts of the National Rail Transportation Policy as Congress envisioned the policy in 49 U.S.C. 10101a, P.L. 96-448, (1980). The policy's main goal was "to ensure the development and continuation of a sound rail transportation system... to meet the needs of the public and the national defense.", see *U.S. Code Congressional and Administrative News*, 96th Congress, 2d session, 1980, Vol. 4, at 4157. The ICC's action in this case puts the priority of recreational trails ahead of rail use. The rail transportation policy makes no mention of trails. In fact, the ICC's own policy since 1988 puts OFAs and continued rail use ahead of trail use, *Rail Abandonments-Use of Rights-of-Way as Trails*, supra.

The ICC justified their decision on the basis of a "mere" offer of $175,000; an offer that was unaccepted and expired on its own terms, App-F-3. The offer had no rationalization to value except it was for slightly more than the acquiring carriers had shown as available cash assets.

Much federal case law has been written since 1980 about the importance of the National Rail Transportation Policy, *Illinois Commerce Commission v. ICC*, 787 F.2d 616 (1986), (ICC must consider all aspects of the rail transportation policy and ease barriers to competition), *Brae Corp. v. U.S.*, 740 F.2d 1023 (1984), (Congress had great concern that large carriers might squeeze profits from small carriers thus small carriers needed protection), *Seaboard Coast Line v. U.S.*, 724 F.2d 1482 (1984), (tariffs were uncompetitive and not in line with the rail transportation policy), *Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (1994), (the aim is continuation of rail service), *Cheney R. Co. v. ICC*, 902 F.2d 66 (1990), (ICC can choose to look at competing applications for OFA's in order to preserve rail service, *emphasis supplied*). In the instant case the competing bid was not for rail use, but another use of the right-of-way.

The ICC broke their mandate from Congress when they allowed a non-rail use to override continued rail use. The ICC could have ordered further investigation into the marketable title issue for the calculation of the net liquidation value, but instead the ICC chose to accept an unaccepted offer to overvalue the rail line property and procedurally keep petitioner from acquiring the line.

The ICC cannot just override their own rules to fit the issue at hand. The D.C. Circuit in *Shepherd v. MSPB*, 652 F.2d 1040 (1981) stated: "Of course, we must overturn agency action and interpretation inconsistent with the regulations and statutes themselves.", at 1043. See also *Union of Concerned Scientists v. Nuclear Regulatory Commission*, 711 F.2d 370, 381 (DC Cir. 1983).

Thus, the resolution of the rail transportation policy issue as administered by the ICC in this instance needs to be rectified with a remand.

III. THE ICC WENT AGAINST THE ESTABLISHED PRECEDENCE OF *IOWA TERMINAL v. ICC*, 853 F.2d (1988), WHEN THEY DID NOT ALLOW PETITIONER'S NOMINAL OFFER FOR AN OFA.

The 1988 D.C. Circuit case of *Iowa Terminal*, supra should have been clear to both the ICC and the lower court in petitioner's action, but the opinion was not adhered to at all, see U.S. Supreme Court Rule 10.1(a). While the ICC mentioned *Iowa Terminal* in their decision, App-C-8, the ICC adopts BN's rational that BN did not really mean to give away the right-of-way in their agreement/contract with the city of Seattle even though the agreement clearly states they would give a 30-foot right-of-way for no value, App-C-6. The D.C. Circuit went along with the ICC rational when they affirmed the ICC decision.

The BN agreement with the city does not break down the line into parcels, and the ICC never required BN to do so during petitioners proceedings. From a plain reading of the agreement, BN was to receive no value other than for the city to remove the rails and ties from city streets and the rest of the right-of-way, something petitioner will have to do if petitioner ever abandons the line in the future.

Iowa Terminal is unusually clear on this point, "Section 10905 requires, however, that the sales price be calculated on the basis of what the seller would have realized from the sale of assets had the line in fact been abandoned. Nobody disputes that 'but for the taking' in this case, petitioner would have transferred the right-of-way to the Conservation Board without compensation", *Iowa Terminal* at 968, emphasis added. "Sales price" as used in *Iowa Terminal* is used synonymously with net liquidation value, 49 C.F.R. 1152.27 et seq.

Also in *Chicago Northwestern Transp. Co. v. U.S.*, 678 F.2d 665 (1982), Judge Posner posits ". . .and since it therefore would have been worth nothing to the railroad if it had abandoned the line, the Commission valued it at nothing in computing the line's fair market value, . . .The value of the land was properly set at zero in these proceeding because that is the value the land would have had to C&NW had it been permitted to abandon the Lake Geneva line.", at 671, emphasis added. *Chicago Northwestern* involved a case where the railroad did not own title to the right-of-way as is the case before

this Court, although in the instant case there is a dispute as to the true nature of one of the two deeds.

Another way to look at the land value issue before this Court is to assume that this abandonment would go forward without an OFA, without a subsidy, and without an interim trail use condition imposed (16 U.S.C. 1247(d), *Preseault v. ICC*, 494 U.S. 1 (1990)). If no conditions are imposed by the ICC after abandonment, then BN would have to allow the right-of-way to revert back to abutting property owners or to the heirs of the Ross estate, see *Roeder v. BN*, 730 P.2d 1308 (1987). But if BN did claim fee title ownership in any portion or all of the right-of-way, BN and the abutting owners or the heirs of Ross estate would have to litigate the ownership issue in Washington State courts. That is the exact issue the ICC has avoided over the years when an ambiguous deed shows up in an abandonment proceeding, see *Central Michigan Railway Co.-Abandonment*, ICC Docket No. AB-308 (sub. No. 1), served October 4, 1991, where the ICC declared that land titles that are other than by warranty or quit claim deed are ambiguous and receive zero value for net liquidation value purposes, at page 3. In other words, the ICC stayed away from determining state law issues on titles and made the blanket statement that if the titles were ambiguous then the ICC would assign no value to the property. That is all petitioner is asking for here. The ICC admits the Ross deed is ambiguous: "The language of the Ross deed is ambiguous.",
App-C-14.

In any event, BN should not receive any value for the land in the Ross and Burke deeds. To reiterate, all the land in petitioner's 2000 foot OFA is in these two deeds so consequently, there should be no value given for the land portion of the net liquidation value. BN and the ICC already admit that the rails and tie salvage value is nominal so the net liquidation value set by the ICC should be a nominal $10.00. This is the exact reason petitioner bid $10.00 in the original OFA.

The ICC clearly misread *Iowa Terminal*, *Chicago Northwestern*, and *Central Michigan* which should be another cause to remand back to the lower court or directly to the ICC. See U.S. Supreme Court Rule 10.1(a).

IV. THE ICC ARBITRARILY AND CAPRICIOUSLY REJECTED PETITIONER AS NOT BEING A *BONA FIDE* PURCHASER AND REJECTED PETITIONER'S *BONA FIDE* OFFER OF FINANCIAL ASSISTANCE MADE IN GOOD FAITH PURSUANT TO 49 U.S.C. 10905.

Petitioner made a good faith OFA after considerable investigation into the value of the rails and ties after salvage and the value of the underlying real estate. Nevertheless, the ICC cast aside petitioner's evidence and facts and made an arbitrary and capricious decision to allow recreational trail use over continued rail use. see App-C1.

"The term arbitrary has been variously defined, but in general is defined as willful and unreasoning action, without consideration and regard for the facts and circumstances presented.", 6 C.J.S. Arbitrary 144 (1992). That description of arbitrary fits the instant case to a tee. The ICC completely disregarded the ambiguity of the Ross deed, they completely disregarded the importance of the BN/city of Seattle donation agreement, they disregarded the *Sharp v. U.S.*, supra, precedence on unaccepted offers, they accepted RTC's late-filed $175,000 offer as valid but did not require RTC to show funds available, and they ruled petitioner not a *bona fide* OFA purchaser because petitioner had only $48,000 in the bank, even though there was no evidence the $48,000 was not enough to cover operation of the short line.

The arbitrary and capricious nature of the ICC in this case is very obvious when one looks at a very recent decision of the ICC where they completely turned their argument around concerning section 10905 third party offers, *Wyoming & Colorado:*

> ". . . . We do not wish to determine the NLV (net liquidation value) based on an offer made in the knowledge that the offeror would not actually have to pay the purchase price. The opportunity for receiving inflated offers as evidence of NLV is too great for us to adopt such a practice. . . . "

Wyoming & Colorado, supra at page 7. Compare that to the ICC decision in the instant case where the RTC $175,000 offer was the minimum acceptable offer that petitioner had to meet to acquire the right-of-way.

While SLSE's OFA was for only $10.00, that was the value of the abandoned rail line when figuring true net liquidation value as the ICC and the federal courts have done historically, see *Iowa Terminal v. ICC*, 853 F.2d 965 (1988) where the abandoning railroad had agreed to give, for zero value, to a government entity part of their right-of-way, the D.C. Circuit said the ICC should not have put any value on that land for net liquidation value, at page 969.

The points in *Iowa Terminal* are exactly on point in the instant case where BN agreed to give a 30-foot right-of-way to the city of Seattle after abandonment. Petitioner would have been satisfied with a 30-foot right-of-way for its railroad, but the ICC never gave petitioner a chance to accept that option because the ICC foreclosed any further action with their decision of petitioner not being *bona fide*.

Also see *Chicago and Northwestern Transp.*, supra, where Judge Posner said the value of the land was properly set at zero because "that is the value the land would have had to C&NW had it been permitted to abandon the line", at 669-671. *Chicago Northwestern* also stands for the proposition that fair market value in a 49 U.S.C. 10905 proceeding cannot be overbid just because some entity has plenty of money to spend. The ICC seems to take one position one day and completely turn around the next. The basis of American administrative law is the rules and statutes are uniformly administered to everyone. The ICC cannot ignore its own regulations and pertinent statutes, *New Mexico Navajo Ranchers Assoc. v. ICC*, 702 F.2d 227, 230 (1983).

In previous decisions, the ICC had ruled that deeds with ambiguous titles would be given no value for net liquidation value purposes, see *Central Michigan Railway Co.-Abandonment*, ICC Docket No. AB-308 (sub. No. 1), served October 4, 1991, where the ICC declared that land titles that are other than by warranty or quit claim deed are ambiguous and receive zero value for net liquidation value purposes, at page 3.

The ICC acted arbitrarily and capriciously when they accepted RTC's $175,000 offer as the minimum value SLSE would have to pay for the line even though the ICC never required RTC to show the good faith and *bona* fides of their offer. Petitioner was required to show it had

assets to acquire the line; why shouldn't the ICC require another bidder to also show assets? See *People of the State of Illinois v. U.S. and ICC*, 666 F.2d 1066, 1077,1078 (1981). The ICC , as must all government agencies, must perform their administrative duties in an even-handed manner without prejudice to anyone. An ICC decision is arbitrary and capricious when the decision "exceeds the Commission's authority, or diverges without explanation from agency precedence. . . .the Commission 'considered all relevant factors and provided a reasoned explanation for its decision.' ", quoted from *Iowa Terminal*, at 969 supra, in *Missouri Pacific Railroad v. I.C.C.*, 23 F.3d 531, 533 (1994).

It is clear that the ICC acted arbitrarily and capriciously when they assigned value to an ambiguous deed in the right-of-way of SLSE's acquisition. The ICC even admitted in its April 22, 1994, decision that Parcel 66, the Ross Deed, was ambiguous, see second paragraph App-C-14. That is contrary to their own previous decisions in *Central Michigan, Wyoming & Colorado* and *Chicago Northwestern Transp. Co.*, supra. Also, the ICC should not have allowed RTC's offer without a showing that RTC was *bona fide* or at least had assets.

CONCLUSION

Petitioner respectfully requests this Court to accept this Petition for Writ Of Certiorari for reasons that include the following:

1. The ICC decision is contrary to long standing U.S. Supreme Court precedence in *Sharp v. U.S.*, supra, when the ICC allowed an unaccepted offer to set value for 49 U.S.C. 10905 net liquidation purposes. U.S. Supreme Court Rule 10.1(c).

2. The decision of the lower court and the ICC is contrary to Congressional intent and jeopardizes the future of the National Rail Transportation Policy as defined in 49 U.S.C. 10101a.

3. The ICC acted inconsistent with *Iowa Terminal*, supra, when they disallowed petitioner's nominal offer of financial assistance in a 49 U.S.C. 10905 proceeding. U.S. Supreme Court Rule 10.1(a).

4. The ICC actions were arbitrary and capricious when the ICC allowed an unsupported and unaccepted offer to set the net liquidation value and summarily dismissed petitioner and petitioner's offer as *bona fide* without allowing petitioner a chance to prove its nominal offer was valid. Also, the ICC went against its own past precedence and assigned value to an ambiguous land title deed and allowed a third party to make an offer without a showing of the party's *bona fides*.

Dated this 20th Day of September, 1995

Respectfully submitted,

Daryl Deutsch
Counsel of Record

APPENDIX A

United States Court of Appeals
For The District Of Columbia Circuit

Nos. 94-1341, 94-1456 September Term 1994

Filed May 10, 1995

Seattle, Lake Shore and Eastern
Railroad, Inc. and Lake Union
Terminal Railroad company,
Petitioners

v.

Interstate Commerce Commission and
United States of America, Respondents

Burlington Northern Railroad Company,
City of Seattle, and Rails to Trails
Conservancy, Intervening Respondents

ON REVIEW FROM THE INTERSTATE COMMERCE COMMISSION
Before: Williams, Ginsburg, and Randolph *Circuit Judges*.

JUDGMENT

These petitions for review were considered on the record from the Interstate Commerce Commission and on the brief and arguments of counsel. The court is satisfied that appropriate disposition of these cases does not call for further opinion. See D.C. Cir. Rule 36(b).

The Interstate Commerce Commission reasonably concluded, based upon the written Rails to Trails Conservancy offer of $175,000 for both parts of the line at issue in this case, that the petitioners' offer of $10 for each of the two parts were unlikely to equal the acquisition cost of the line. See 49 U.S.C. 10905(d)(2)(b). The Commission's findings of fact being supported by substantial evidence and its conclusions therefrom being reasonable and in accordance with law, it is

ORDERED and ADJUDGED that the petitions for review be DENIED substantially for the reasons set out in the Commission's Decision, *Burlington Northern Railroad Company--Abandonment Exemption--in King County,* WA, Docket No. AB-6 (Sub-No. 357X) (April 21, 1994).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41(a) (2), This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT
signature
Mark L. Langer, Clerk

Appendix B

United States Court of Appeals
For The District of Columbia Circuit

No. 94-1341 September Term, 1994

Filed July 3, 1995

Seattle Lake Shore,
Eastern Railroad, Inc., et al.,

Petitioners,

v.

Interstate Commerce Commission,

Respondent

and Consolidated Case No. 94-1456

BEFORE: Williams, Ginsburg and Randolph, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed June 10, 1995, it is

Ordered, by this court, that the petition is denied.

Per Curiam
For the Court
Mark J. Langer, Clerk

BY:

signature
Robert A. Bonner
Deputy Clerk

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Service Date-April 22, 1994

DECISION

April 21, 1994

Docket No. AB-6 (Sub-No. 357X)

BURLINGTON NORTHERN RAILROAD COMPANY
--ABANDONMENT EXEMPTION--IN KING COUNTY, WA
IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE

Decided: April 21, 1994

By decision and notice of interim trail use or abandonment served February 3, 1994 (February 3 Decision), and notice published in the Federal Resister (59 FR 5443) on February 4, 1994, we exempted from the prior approval requirements of 49 U.S.C. 10903-10904 the abandonment by Burlington Northern Railroad Company (BN) of its 3.57-mile rail line between Interbay and Terry Avenue in Seattle, King County, WA. The line extends from BN Engineering Station (ES) 267+00 to ES 143+48 and from SS 118+28.7 . 6+60.3 to ES 34+55.2. We imposed a public use condition under 49 U.S.C. 10906 and 49 CFR 1152.28 and issued a notice of interim trail use (NITU) under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), and 49 CFR 1152.29, as requested by the City of Seattle Engineering Department (City). In addition, the exemption and NITU were subject to standard employee protective conditions and a condition recommended by our Section of Environmental Analysis (formerly Section of Energy and Environment) concerning salvage activities.

As detailed below, Lake Union Terminal Railroad (Lake Union) and Seattle, Lake Shore and Eastern Railroad, Inc. (Lake Shore) (collectively, offerers) filed offers of financial assistance (OFAs) to purchase for $10 each, two adjacent segments of the line. By decision served March 16, 1994, the Director of the Office of Proceedings (Director) found the offers not bona fide and not reasonable to initiate negotiations between the parties. Lake Shore and Lake Union appealed the Director's decision. We deny the appeals. We uphold the Director's decision because, as detailed below the record makes clear that: (1) the market value of each of the line segments in issue substantially exceeds $10 in view of outstanding offers by other entities; (2) because BN

may have marketable title under Washington law to a portion of the line sought by Lake Shore it would appear that the underlying real estate is not worthless and should be included in the property's value as measured by net liquidation value; and (3) even if the $10 offers could be considered bona fide, we are not satisfied that offerers have met the financial responsibility criterion for submission of an OFA sufficient to initiate negotiations under 49 U.S.C. 10905.

BACKGROUND

The exemption was scheduled to become effective on March 6, 1994, but the effective date was extended to March 16, 1994, by the timely filing of two expressions of intent to file OFAs under 49 CFR 1152.27(C)(2)(i). The expressions of intent were filed by Lake Union and Lake Shore. On March 11, 1994, offerers filed OFAs to purchase separate portions of the line.[1] Lake Union sought to acquire for $10 the 3.12 mile portion of the line between BN Engineering Station (ES) 243+00 and ES 143+48 and between ES 118+28.7 . 6+60.3 and ES 34+55.2. Lake Shore sought to acquire for $10 the 2,400 foot (.45 mile) portion of the line between BN Engineering Station (ES) 267+00 and ES 243+00. In their appeals, Lake Union and Lake Shore have clarified the limits of the segment that each seeks to acquire. Referring to a map placed in the record by BN, Lake Shore explains that the segment it seeks to acquire measures approximately 2,000 feet. Lake Union states that it seeks to purchase a 3.2 mile segment that comprises the remainder of the line for which the exemption for abandonment was granted.[2]

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[1] In response to separate requests filed by Lake Union and Lake Shore, the due date for filing the OFAs was extended by the Director, acting under delegated authority, to March 13, 1994, and the effective date of the exemption was extended to March 23, 1994.

[2] Lake Shore asserts that it seeks to acquire the portion of the rail line only as far east as the point where Parcel No. 64, in blue on the North Pacific Station Map V-8-SL5-A, is interrupted by ordinance property. Lake Shore Appeal (LS), 2; Lake Union Appeal (LU), 1. Lake Shore states that it also seeks to acquire that portion of Parcel No. 66 extending from the western endpoint of the abandonment beginning approximately 50 feet west of 8th Avenue West, easterly to 3rd Avenue West. LS, 2. Lake Union states that it seeks to acquire the remainder of the rail line (all property within and east of the ordinance property that separates the portions of Parcel No. 64 on Station Map V-8-SL5-A: 3.2 miles, all property east (right) of a point approximately 250 feet east (right) of the point marked on the loose map filed with BN's protest as "284+08W,0+OOE.") LU, 2.

On March 16, 1994, BN filed a protest (March 16 protest) requesting that the Commission reject both OFAs on the grounds that neither OFA is bona fide and that, in the alternative, neither offeror is financially responsible. Principally BN contested offerers' $10 valuations, claiming that the value of the right-of-way in question is substantially higher.

By decision served March 16, 1994 (March 16 Decision), the Director determined that the $10 offers are substantially lower than any minimum purchase price BN could reasonably be expected to consider.[3] The Director found that BN had provided a reasonable basis to support a substantial value for each segment. Conversely, the Director found that offerers had submitted only bare assertions in support of their nominal offers and failed to offer a reasonable basis upon which he could base a finding that the real property is worthless. The Director found that offerers had not adequately explained the basis for the disparity between their offers and BN's valuation of the segments, as required by 49 U.S.C. 10905(c) and 49 CFR 1152.27(c)(2)(ii), and that the OFAs were therefore not bona fide and reasonable to initiate negotiations among the parties.[4]

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[3] Commission regulations afforded the Director little time in which to render his decision. Under 49 CFR 1152.27(e)(2), the Commission's initial decision upon review of an OFA in an exemption proceeding is to be issued within 35 days of the publication or 5 days after the offer is filed if the time for filing has been tolled. Here the time for filing OFAs was tolled and the OFAs were filed March 11, 1994. Thus, the decision had to be issued by March 16, 1994, only 3 working days after the filing date. The decision advised the parties of their appeal rights and extended the effective date of the exemption to April 22, 1994, to allow for consideration of appeals.

[4] In other proceedings, distinguishable from this one, the Commission has considered $10 offers and determined that they were bona fide in the circumstances of the case. *See Chelsea Property Owners--Abandonment--Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY*, Docket No. AB-167 (Sub-No. 1094) (ICC served Dec. 9, 1992), Petition to reopen denied (ICC served July 22, 1993) (New York City). But in New York City, the Commission rejected the OFA because offerers had not demonstrated that they were financially responsible, or that their offer was one for continued rail service.

Lake Shore and Lake Union filed appeals on March 24, 1994 and March 28, 1994, respectively.[5] Offerers request that the Commission reverse the March 16 Decision by determining that the OFAs are bona fide and offerers financially responsible and making appropriate provision for negotiations among the parties.

On March 15, 1994, the Rails to Trails Conservancy (RTC) submitted a protest in response to the appeals. The protest states that RTC "is prepared to offer and hereby does offers" to pay BN $175,000 for the entire corridor at issue (including $65,000 for the portion of the line sought by Lake Shore and $110,000 for the remainder of the corridor).[6] RTC also argued that the OFAs served as ploys to prevent the corridor from being preserved for trail purposes.

On April 7, 1994, BN filed replies to the appeals reasserting its position that the line has a value far greater than the $10 that Lake Shore and Lake Union offer for the respective portions they wish to purchase and requesting that the Commission uphold the March 16 Decision as to both offers. On April 5, 1994, under 49 CFR 1114.21(b)(2) and 1114.26, BN submitted a copy of its interrogatories directed to Lake Union. The interrogatories relate to the incorporation and financial status of Lake Union and its involvement in rail transportation. No answers have been filed.

APPEALS

Offerers generally assert that BN did not provide a reasonable basis to support a substantial value for the involved line segments.[7] Offerers reassert that their offers are reasonable and that they have adequately explained the disparity

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[5] In addition to the appeals and responsive pleadings served on the parties of record, we have received several letters without certificates of service. These are general expressions of support from businesses located in the vicinity of the rail line for continued rail service as proposed in the OFAs.

[6] See also RTC's April 1, 1994 letter reiterating that RTC specifically bid $175,000 for the corridor."

[7] Lake Shore asserts that because the real estate appraisal submitted with BN's letter of March 7, 1994 (March 7 Letter) did not consider the property 50 feet west of 8th Avenue West and 3rd Avenue West, BN's $4,485,000.00 estimate was not for that

(7 continued)

between their offering prices and BN's valuation of the property.[8] The crux of their argument is a continued assertion that BN lacks marketable title to the properties which are the subject of the offers. They also base their argument for a value of zero on a Trail Implementation Agreement (TIA) between BN and City, dated September 23, 1991, which according to offerers, amounts to a donation of the property and thus nullifies any claim of value. Offerers also assert that the cost of removing the track materials from they segments they seek to acquire exceeds gross salvage value.

Quality of title and marketability. Both offerers claim that BN lacks marketable title to the underlying property. They assert that therefore the property has no value.

Lake Shore asserts that the pertinent deeds[9] contain strong indications that railroad easement property interests rather than full fee interests were being transferred. Lake Shore asserts that BN's predecessor to Parcel No. 66 had neither a warranty deed nor a quitclaim deed, but rather only a right-of-way easement for railroad use. Lake Shore asserts that BN's valuation of this property interest was not based on an independent appraisal or any other objective evidence. Lake Shore notes that, in the March 7 Letter, BN admitted it did not have marketable title to Parcel No. 64. Therefore, Lake Shore asserts that

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7 (continued)
property (8-3rd avenues), and that the property thus has no substantial value. LS, 9-10. Lake Union asserts that BN's appraisal did not consider the four parcels near Terry Avenue and Mercer Street, which BN claimed to have a value of 4520,000. Lake Union asserts further that BN did not submit any evidence in support of that value, or any other value. Lake Union asserts that BN changed its valuation in its March 16 protest, filed after the filing of the OFAs, and, among other things, omitted the claimed value for the parcels near Terry and Mercer. *Id.*

[8]Both offerers assert that BN provided none of the following: a minimum purchase price (see section 10905(b)(1); see also 49 CFR 1152.27(a)(1)(ii)), a most recent report of physical condition of the line (see section 10905(b)(2)), and an estimate of the net liquidation value (NLV) of the properties.

[9]The pertinent deeds are identified as the Burke deed (Parcel No. 64) and the Ross deed (Parcel No. 66).

BN's assignment of value to the Parcel No. 64 property is contrary to established law. BN responds that its documentation has amply supported its valuation for the respective properties. BN acknowledges that its title to the right-of-way in Parcel No. 64, under the Burke deed, is subject to a reversionary interest. It asserts, however, that it did not assign any value to this parcel and that its $3.9 million estimate, for the 2400 feet originally sought by Lake Shore, was based solely on the value of Parcel No. 66, for which BN has marketable title under the Ross deed.

Regarding the property it originally sought, Lake Union questions the difference in BN's valuation of $2,445,850 and the total appraised value of $3.750.000. as indicated in the appraisal report submitted by BN. BN responds that the total appraised value is based on an assumption that all property was in fee simple,[10] whereas BN's lower valuation is based solely on property for which it has marketable title. BN concedes that, in the March 7 Letter, it erred in referring to the 97,834 square feet, which it valued at $25 per square foot, as property in which there is a reversionary interest rather than nonreversionary property.[11] BN asserts, however, that at the very least, after subtracting the costs of track removal (which BN maintains would cost a maximum of $1.2 million), the value of the entire segment referred to in Lake Union's offer exceeds $1 million.[12]

Contract with City. The TIA, according to offerers, requires BN to convey a corridor 30 feet wide along the entire length of the property at issue[13] without cash consideration. Under the TIA, City agreed not to enforce the provisions of a franchise agreement otherwise requiring BN

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[10]The appraisal report indicates that such an assumption was necessary due to the unavailability, at the time the report was prepared, of any title information.

[11] Reply to Lake Union Appeal, 2-3, 56.

[12] See March 16 protest, 5-6.

[13] The pertinent property is identified as the "South Ship Canal: Section from 15th Avenue West (Ballard Bridge) to the Fremont Bridge." TIA at 1.

to remove the track material from paved city streets and parking lots and to restore the pavement. The TIA establishes that the 30-foot corridor has a fair market value (FMV) equal to the cost of removing the track materials and restoring the pavement. Lake Shore asserts that all of the property it seeks to purchase is covered by the TIA. Offerers assert that, because BN will receive nothing from City in return for the property, the property has no value.[14]

BN asserts that the noncash consideration in the TIA does not invalidate the FMV of the property. BN provides a background to the TIA. The railroad discusses three agreements, the third being the TIA described above.[15] BN asserts that the FMV for the properties, under the TIA, is 22.3 million. Here Lake Union is apparently seeking to purchase the entire width of the right-of-way, which although it measures 100 feet in some places, measures only 30 feet in others. BN asserts that Lake Union is attempting to use the TIA valuation for the portions only 30 feet in width to value all of the property, including the wider portions.

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[14] *Citing Iowa Terminal R. Co. v. ICC*, 853 F.2d 965, 969 (D.C. Cir. 1988) (Iowa Terminal). LS, 19; LU, 9.

It is noteworthy, however, that the TIA notes the possibility of a higher value for the right-of-way: "In the event the value of the right-of-way sought by the City exceeds the value of allowing track to be left in place within the corridor, the City may consider additional trackage to be abandoned in place, outside the corridor, or other forms of consideration *mutually agreed to be the 'Parties'*." TIA at 1. (Emphasis added).

[15] The first agreement, entered into in June 1988 among BN, City, and Glacier Park Company, took the form of a Joint Statement of Principles (Joint Statement) regarding cooperation in trail extensions, including possible transfers of specific rights-of-way in lieu of restoration otherwise required by BN's franchise agreements. The second agreement, entered into in January 1989 by BN and City, was the Burke-Gilman Trail Agreement (BGT Agreement) which covered the transfer of the 30-foot corridors and a right-of-first refusal for property beyond those corridors. The BGT Agreement supplemented the joint statement and resolved disputes.

BN asserts that the FMV of $2.3 million specified in the TIA includes properties other than those included in Lake Shore's offer and is limited only to a 30-foot strip. BN asserts also that it has been negotiating with City under the right of the first

(15 continued)

BN asserts the offerers' reliance on is misplaced. It argues that not only do the four corners of the TIA not contemplate a donation, as was the case in Iowa Terminal, but also that City's recent offer of $600,000 for properties outside the 30-foot strip is evidence that supports its reading of the TIA.

Track removal costs. BN questions Lake Shore's assertion that track removal costs for the property Lake Shore seeks to purchase would be $1.25 million. BN asserts that the reference to such a cost in the TIA relates to ordinance properties and not those properties Lake Shore seeks to purchase. BN argues that even if it were to concede such track removal costs, the minimum value of the property would still be substantially higher than $10. Similarly, BN disputes Lake Union's claims regarding track removal costs for the property Lake Union seeks to purchase. BN asserts that the removal cost estimates in the TIA do not include salvage material, but do include removal costs for other properties in the Seattle area. BN argues that, even assuming these over-inclusive removal costs were correct, the value of the property far exceeds $10.

DISCUSSION AND CONCLUSIONS

Burden of Proof. Although we have determined that OFAs to acquire lines for continued rail service need not be detailed, the information

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(15 continued)
refusal provision for properties beyond the 30-foot strip, and that the most recent offer from City, allegedly filed with the Commission on April 1, 1994 (April 1 Letter), was for $600,000. BN asserts that this offer is evidence that neither City nor BN intended that the TIA set the full FMV.

By letter filed with the Commission on April 11, 1994, offerers' representative objected to the April 1 Letter as an attempt to introduce new evidence in a reply to appeals. The Commission did not receive a copy of the April 1 Letter. The March 16 Decision instructed City (referred to in that decision as SED) to, in the future, comply with the requirement that all parties of record be served and the filed document be accompanied by an appropriate certificate of service. 49 CFR 1104.12. This instruction was due to City's failure to serve offerers' representative with its March 5, 1994 protest. The March 16 Decision considered the protest, notwithstanding the procedural deficiency, because offerers' did in fact obtain a copy of, and respond to, the protest. Similarly here, it is apparent that BN and offerers' representative both received City's April 1 Letter because BN mentioned the letter in its replies to the appeals and offerers' representative responded to the letter in the April 11 Letter.

submitted in support of an OFA must be sufficient to show that the offeror is financially responsible and that its offer is reasonable. *ConRail Abandonments under NERSA*, 365 I.C.C. 472, 476 (1981). Moreover, our rules, at 49 CFR 1152.27(c)(2)(iii), require that the information submitted in support of an OFA must be included in the OFAs itself.[16]

Offerers argue that Commission cases indicate that OFAs need not be detailed. They assert that it follows that, in their particular OFA, they need not explain with precision the disparity between their offering prices and BN's asking price. Offerers assert that the standard is whether the offers are bona fide and reasonable to start negotiations and that they need do no more than sufficiently identify reasons why the price offered is less than the minimum price sought by the carrier. Lake Shore argues that it was not required to "furnish extensive documentation in explanation of the disparity between its offer and BN's valuation." LS, 18.

An offeror, who makes an offer substantially less than the value claimed by the railroad for the line he seeks to acquire, must explain this discrepancy. Of course, this presupposes that the railroad has submitted some support for its valuation. BN has put such support on the record.

While extensive documentation is not necessary, Lake Shore did not provide sufficient documentation. For example, Lake Shore, in its OFA, referred to a legal opinion from a Washington attorney, Daryl Deutsch, advising Lake Shore regarding BN's title. But Lake Shore did not submit the legal opinion, dated January 24, 1994, with its OFA, but rather waited until it filed the appeal. The letter contains relevant conclusions regarding the deeds to BN's predecessor, which according to Deutsch, conveyed easements for rail use rather than fee title and indicated that BN lacks marketable title to the property subject to those deeds and the subject of Lake Shore's offer. Although not necessarily dispositive on the issue, the letter certainly may have improved Lake Shore's claim that BN lacks marketable title to the

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[16] Our OFA rules are designed to make it unnecessary to screen the entire record for evidence relevant to the OFA.

property and would not be considered "extensive" documentation. Finally, we note that the record also shows that RTC agreed to pay $175,000 for the properties at issue.

NLV Standard.

In assessing offerers' arguments on the value (price) of the line at issue, we are guided by principles used in our decisions to set terms and conditions. When setting terms and conditions following acceptance of an OFA, we may not set a price that is below the FMV of the line. 49 U.S.C. 10905(f)(1)(C); *Portland Traction Company--Abandonment Exemption--In Multnomah and Clackamas Counties, OR*, Docket No. AB-225 (Sub-No. 2X) (ICC served Jan. 10, 1990). In the leading case in this area, *Chicago and Northwestern Transp. Co. --Abandonment*, 363 I.C.C. 956, (1981) (Lake Geneva Line), aff'd sub nom. *Chicago and North Western Transp. v. United States*, 678 F.2d 665 (7th Cir. 1982), the Commission determined that, in the absence of a higher going concern value for continued rail use, the Constitutional minimum value in proceedings under section 10905 is the value of the rail properties for their highest and best nonrail use. Usually, this is the net liquidation value (NLV). NLV includes real estate value plus gross salvage value of track and materials, less removal costs. See *Boston and Maine Corp. and Springfield Terminal RR. Corp.,--Abandonment and Discontinuance of Service in Hartford County, CT--In the Matter of a Request to set Terms and Conditions*, Docket No. AB-32 (Sub-No. 43) (ICC served August 9, 1991) (Boston & Maine).

Market-based offers for the line at issue.

In this case, unlike most cases under section 10905, we have direct evidence of market value. As discussed above, RTC made a firm $175,000 offer for the entire corridor at issue. Accordingly, any valuation of this property for rail purposes must include, at a minimum, the $175,000 that BN would be deprived of if the property was conveyed to someone else. Moreover, Lake Shore, Lake Union, and BN have all referred to a $600,000 offer evidently made by City for property within the corridor, but outside the 30-foot strip covered

by the TIA. In view of these offers, Lake Shore and Lake Union have not adequately justified their $10 offers for portions of the line or shown that they are reasonable. The offers from RTC and City show that the property has substantial value to BN, City, and RTC, notwithstanding any assertions or conclusions regarding title.[17]

In *Portland Traction*, the Commission stated that: "While section 10905 was enacted to assist 'shippers that are dependent upon continued rail service,' *Hayfield Northern R. Co. v. Chicago & N W. Transp. Co.*, 467 U.S. 622, 630 (1984) . . . nothing in it or its legislative history permits us to value a line at less than fair market value, even to ensure continued rail service from a prospective purchaser." Slip op. at 5-6. The Commission also indicated that a property owner is entitled to the minimum value of the property guaranteed by the taking clause of the Constitution and that forcing a sale at a price substantially less than the railroad would receive under an "executed, arms length sale contract" would run afoul of the rail transportation policy as set forth at 49 U.S.C. 10101a(5). Slip op. at 6. The Commission determined the sales contract to be the "best evidence of the right-of-way's marketability and NLV, notwithstanding the offeror's assertions regarding quality of title." Slip op. at 5. In sum, based on the RTC and City offers alone, we find that the $10 Lake Union and Lake Shore offers for this line are not bona fide or reasonable. *Portland Traction*.

Quality of Title and Marketability.

Offerers attempt to explain the discrepancy between their offers and BN's asserted valuation of the properties in question by arguing that BN lacks marketable title to the properties in question. The

[17] We note that regardless of whether the property at issue here is used as a trail under 16 U.S.C. 1647(d) or for continued rail service under 49 U.S.C. 10905, there will be no vesting of reversionary interests. Thus, the quality of title is less significant here than it would be in other cases.

Commission has stated that, for computing the NLV, we generally assign value to land for which the railroad hold marketable title.[18] Marketable title generally means that the properties held by warranty or quitclaim deed without restrictions or reversionary language. Typically, we have refused to assign value to land obtained through condemnation or claims of adverse possession because the interest is generally a mere easement which terminates upon abandonment.[19] But, as pertinent to our analysis here, these general principles are not absolute. Here the RTC offer may not depend upon the quality of BN's title at all. But, in evaluating the offeror's argument that its $10 offer is bona fide, we will consider its argument that the parcel is worthless because the title is not marketable.

In short, we will consider contrary claims of marketable title based on applicable state law. The showing of marketable title must be clear, however, as we are not equipped to resolve disputed questions of real property under the differing laws of 50 states. *Central Michigan*, slip op. at 3.

Washington State law regarding deeds.

For us, the issue raised by the parties' arguments concerning title is whether offerers have met their burden of proof by demonstrating that BN lacks marketable title to the property in question and that this precludes us from assigning any value to the real property for purposes of NLV. Because BN concedes that it does not have marketable title under the Burke deed for Parcel No. 64, we need only make this determination with respect to the Ross deed for Parcel No. 66. For the reasons discussed below we conclude that offerers have not met their burden. There is a reasonable basis for finding that BN has marketable title to Parcel No. 66 and that, therefore, this parcel cannot be presumed to be worthless and omitted from the NLV.

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[18] E.g., *Central Michigan Railway Company Abandonment-East of Iona to West of Owosso--In Michigan*, Docket No. AB-308 (Sun-No. 1), slip op. at 3 (ICC served Oct. 4, 1991) (*Central Michigan*).

[19] See *Lake Geneva Line*, 363 I.C.C. at 959. See also *Chicago & North Western Transportation Company Abandonment in Oneida, Villas, Iron, Ashland and Bayfield Counties, WI and Gogebic County, MI*, Docket No. AB-1 (Sub No. 111), slip op. at 6&7 (ICC served Oct. 9, 1981).

Usually, reference to a right-of-way in the conveying clause is evidence that the property interest conveyed is only an easement. Lack of such a reference in the conveying clause is evidence that the title is in fee. Such a presumption comes from the notion that, as discussed below, it is possible to transfer a fee interest for railroad purposes. But it is necessary to look at all of the surrounding circumstances to determine the intent of the parties.

The record on this issue consists of the legal opinions provided by Lake Shore's counsel, Daryl Deutsch, and BN's counsel, Larry Leggett. Mr. Deutsch concluded that the Burke deed and the Ross deed conveyed only easements in the property and, thus, did not create marketable title for BN. Mr. Leggett concluded that the Ross deed conveyed fee title.

Based on our review of the two conflicting opinions of counsel and the cited Washington case law, we are not able to rule out the possibility that, under Washington law, BN has marketable title to Parcel No. 66 under the Ross deed.

The granting clause of the Ross deed reads:

> grant, bargain, sell and convey unto said party of the second part, and its successors and assigns, forever, a *tract of land* extending . . . Together, with all and singular the tenements, hereditaments and appurtenances thereunto belonging and in any wise appertaining and the reversion and reversions, remainders and remainders rents issues and profits thereof.

(emphasis added). The clause stating the purpose reads:

> unto the said party of the second part, and to its successors and assigns forever, for the [illegible] and purpose for the party of the second part *for track and roadway for said railway* and the proper appendages to such track and roadway. (upon close examination, the illegible word is "use")

(emphasis added).

Mr. Deutsch argues that conveyance of a right to use property for a limited purpose, such as for "track and roadway," as is the case in the Ross deed, necessarily conveys only an easements.[20] Conversely, Mr. Leggett cites several cases for the proposition that it is possible for a deed to a railroad, *for railroad purposes*, to be conveyed in fee.

The language of the Ross deed is ambiguous. BN and RTC, as noted, have shown that the parcel has value. The offerers have the burden to show that the parcel is valueless. The offerers have failed to demonstrate that BN lacks marketable title. Indeed, BN has provided us with a reasonable basis for concluding that, under state law, BN could befound to have marketable title to Parcel No. 66 under the Ross deed.[21] Thus, we conclude that the value of Parcel No. 66 should not be excluded from the NLV of the property in issue. At the same time, the record (especially the RTC offer and the City's $600,000 offer for property outside the 30-foot strip addressed in the TIA) makes clear that the market value of the property in issue substantially exceeds $10, notwithstanding the questions on the marketability of BN's title.

Financial responsibility to provide rail service.

Finally, even if we had found Lake Shore and Lake Union's offers to be bona fide, we are not satisfied that the offerers have met the financial responsibility criterion for an OFA under section 10905.

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[20] Our rules, at 49 CFR 1152.27(c)(2)(iii), require that the information submitted in support of an OFA must be included in the OFA itself. Lake Shore did not submit its legal opinion, dated January 24, 1994, with its OFA, but rather waited until it filed the appeal. Although the opinion was not before the Director when he issued his March 16 decision, we have considered it fully on appeal.

[21] In considering all the circumstances, it is noteworthy that this deed was executed in 1887, and should thus be analyzed under a standard of that time. The Burke deed, although executed 6 months after the Ross deed, serves as evidence that during that period, parties knew how to draft deeds to clearly convey an easement. The Ross deed's ambiguity, when viewed in this context, supports the possibility that Ross did not intend to convey an easement. *See Zobrist v. Culp*, 627 P.2d 1308, 1310 (Wash. 1981). Additional case law supporting this view is summarized in the attached appendix.

Mr. Deutsch also asserted that the $1 consideration under the Ross deed is evidence that Ross only intended to convey an easement. The court in *Swan v. O'Leary*, 225

(21 continued)

BN asserts that the $47,866.95 in bonds, to which the recently incorporated Lake Shore has pointed as evidence of its financial responsibility, underestimates the finances necessary for acquisition and operation of the line. BN also questions Lake Shore's contention that it can operate the line profitably, asserting that Lake Shore has not
shown an income stream sufficient to ensure operations for the required 2-year period.[22]

BN questions Lake Union's claim of financial responsibility as well.[23] BN expresses concern that the documentation provided by Lake Union, which consisted only of the $100,000 cash balance in the personal account of its incorporator, provided nothing regarding the assets of the corporation itself.[24] BN asserts that Lake Union did not indicate why it believes $100,000 would adequately fund capital costs and future operations.

With respect to both offers, BN cites *New York City* in urging the Commission to look beyond the presumption that an offeror is capable

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(21 continued)
P.2d 199 (Wash. 1950) mentioned nominal consideration as only one of many factors to be considered in determining the intent of the parties to an ambiguous instrument of conveyance such as the Ross deed. Therefore, the $1 consideration is not dispositive of the issue.

[22] BN questions Lake Shore's intent to operate because no shippers are located on the line it seeks to acquire. However, Lake Shore has furnished letters showing shippers' intent to use the line if Lake Shore provides service.

[23] BN also questions Lake Union's intent to operate. In response, Lake Union asserts that it intends, in good faith, to provide rail service for named and potential shippers. Citing BN's original petition for exemption (including traffic figures showing that the line carried 102 carloads in 1992 and 49 carloads in the first half of 1993), Lake Union asserts that the portion of the line it seeks to acquire is an active rail line. Further, Lake Union disputes BN's argument that the absence of shipper opposition to BN's abandonment necessarily indicates that the shippers would oppose Lake Union's entry into the market.

[24] The interrogatories directed at Lake Union relate to, among other things, the assets of the corporation.

of conducting 2 years of rail operations upon a showing of ability to provide acquisition costs. We agree with BN's reliance on *New York City*. As the Commission noted there: "A financial responsibility finding relates both to whether the offeror possesses the resources necessary to cover the line's fair market value purchase price . . . and to operate the line for a 2 year period." *New York City* (ICC served Dec. 9, 1992), slip op. at 3.

Here substantial questions have been raised, but not answered, with respect to the adequacy of offerers' financial resources to cover operation of the line during the requisite 2-year period. In light of this and our earlier conclusions regarding the reasonableness of the $10 offers made by Lake Shore and Lake Union we cannot conclude that their OFAs meet the standards of 49 U.S.C. 10905. For all of these reasons we deny the appeals.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Lake Union's and Lake Shore's appeals are denied.

2. This decision is effective on its service date.

By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin. Commissioner Philbin did not participate in the disposition of this proceeding.

Sidney L. Strickland, Jr.

(SEAL) Secretary

APPENDIX

Mr. Leggett cites several Washington cases. The cases include two pertinent rules of Washington law. The first is the general statement that [t]he conveyance of a right of way to a railroad may be in fee

simple or only an easement." *Roeder Co. v. Burlington N. Inc.*, 716 P.2d 855 (Wash. 1986).[1] The second is more specific:

> [I]t is clear that we adopted the rule that when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes as an easement only, *and not a fee with a restricted use*, even though the deed is in the usual form to convey a fee title.

716 P.2d at 859[2] (emphasis added). The first portion of the statement, referring to the granting clause, appears to limit the general statement that it is possible for a right-of-way to be conveyed to a railroad in fee simple: if the nature of the conveyance as a right-of-way is referred to in the granting clause of the deed, the conveyance takes the form of an easement rather than a fee with a restricted use.

It is at this point that the second portion of the statement could be significant. It can be inferred from the statement that a reference in the granting clause to an interest that is "not a fee with a restricted use" that there is, in the universe of deeds, the possibility for a railroad to acquire a right of way as a fee with a restrictive use. These uses could include "for railroad purposes" or "for track and roadway," just to name two.[3]

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[1] Cited in Leggett Letter at 1. See also *Veach v. Culp*, 599 P.2d 526, 527 (Wash. 1979) (*Veach*).

[2] *Quoting Veach*, 599 P.2d at 527. This rule was espoused in *Morsbach v. Thurston County*, 278 P. 686 (Wash. 1929) and clarified in *Swan*.

[3] The court in *Zobrist*, 627 P.2d at 1311, noted that a stated purpose in a deed for the running and operating of a railroad" is different from, and more likely to create an easement than, one for a railroad purpose." Furthermore, a statement regarding reversion in the case of nonuse for a specified period is likely to create an easement. Such a reversion statement is absent from the Ross deed. Indication of a "railroad purpose seems, under Washington law, to create a fee with a restricted use rather than an easement.

APPENDIX D
INTERSTATE COMMERCE COMMISSION
DECISION

Service

Date-Mar 16, 1994

Decided Mar 16, 1994

Docket No. AB-6 (Sub-No. 357X)
BURLINGTON NORTHERN RAILROAD COMPANY
--ABANDONMENT EXEMPTION--IN KING COUNTY, WA
IN THE MATTER OF AN OFFER OF FINANCIAL ASSISTANCE
Decided: March 16, 1994

By decision and notice of interim trail use or abandonment served February 3, 1994, and notice published in the Federal Resister (59 FR 5443) on February 4, 1994, the Commission exempted from the prior approval requirements of 49 U.S.C. 1090310904 the abandonment by Burlington Northern Railroad Company (BN) of its rail line between Interbay and Terry Avenue in Seattle, WA [BN Engineering Station (ES) 267+00 to ES 143+48 and ES 118+28.7-6+ 60.3 to ES 34+55.2], a distance of 3.57 wiles in King County, WA. The Commission imposed a public use condition under 49 U.S.C. 10906, and 49 CFR 1152.28 and an interim trail use condition under the National Trails System Act (Trails Act), 16 U.S.C. 1247(d), and 49 CFR 1152.29, as requested by the City of Seattle Engineering Department (SED). The exemption and NITU were subject to public use conditions, standard employee protective conditions, and a condition recommended by our Section of Environmental Analysis (formerly Section of Energy and Environment) concerning salvage activities.

The exemption was scheduled to become effective on March 6, 1994, but the effective date was extended to March 16, 1994, by the filing of two timely expressions of intent to file offers of financial assistance (OFA) under 49 CFR 1152.27(c)(2)(i). The expressions of intent were filed by Lake Union Terminal Railroad Company (Lake Union) and Seattle, Lake Shore and Eastern Railroad, Inc. (Lake Shore) (collectively, offerers). Each indicated that it was seeking a portion of the line. In response to separate requests filed by Lake Union and Lake Shore, the due date for filing the OFAs was

extended to March 13, 1994, and the effective date was extended to March 23, 1994.

On March 5, 1994, SED filed a protest requesting Commission investigation into and possible denial of any OFA filed by Lake Union or Lake Shore.[1] SED expressed its concern that the requests may not be bona fide requests from financially responsible parties that have the ability to run viable shortline railroads. SED is concerned that Lake Union was formed recently to serve as a ploy to prevent the corridor from being preserved for trail purposes and that Lake Shore is also involved, through its association with a property owners group, in an effort to prevent trail use. SED asserts that efforts by Lake Union and Lake Shore to purchase portions of the line amount to nothing more than a "land grab." Furthermore, SED asserts that the line does not provide the opportunity to run a viable railroad company .[2]

On March 11, 1994, both Lake Union and Lake Shore filed OFAs to purchase separate portions of the line. In their OFAs they also responded to SED's allegations. Lake Union seeks to acquire the portion of the line between BN Engineering Station (ES) 243+00 and ES 143+48 and between ES 118+28.7 = 6+60.3 and ES 34+55.2], a distance of 3.12 miles, for $10.00. Lake Shore seeks to acquire the portion of the line between BN Engineering Station (ES) 267+00 and ES 243+00, a distance of 2,400 feet or .45 miles, also for $10.00.

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[1] SED indicated that it sent copies of its protest to several individuals at BN, but there is no indication that it was served upon offerers' representative. Because offerers did, in fact, obtain a copy of the protest and, as indicated above, responded to it, it will be considered here. In the future, SED should comply with the requirement that all parties of record be served and the filed document be accompanied by an appropriate certificate of service. 49 CFR 1104.12.

[2] On March 15, 1994, the Rails to Trails Conservancy (RTC) responded to the OFAs expressing concerns similar to those of SED. RTC asserts that Lake Shore's OFA is "subterfuge to obtain control over the right of way and then facilitate its fragmentation." RTC Maintains that Lake Shore's letters from shippers are part of this scheme. It asserts that at most only one of the shippers ever used the line and that even then, the volume was very light. RTC concludes that SED's trail use plans are more consistent with future rail service than the offer by Lake Shore. RTC also questions the financial responsibility of both offerers. RTC

(2 continued)

Offerers assert that, on March 8, 1994, they each received materials from BN, including a letter, a statement of the value of the materials, a real estate appraisal, and valuation maps. On March 11, 1994, BN filed with the Commission a copy of a letter dated March 7, 1994 (March 7 Letter), to offerers' representative estimating values of materials for the abandonment. In the March 7 Letter BN, based on a 1993 appraisal, estimates the value of nonreversionary property interests to be approximately $4,485,000. It asserts that removal costs are estimated at $5.00 per foot. Both Lake Union and Lake Shore express concern, in their respective OFAs, that BN did not include any of the following: (1) information directly related to the specific segments; (2) a minimum purchase price; (3) a report of the physical condition of the segments; or (4) an estimate of the net liquidation value of the segments. Offerers request that the Commission, in determining whether Lake Union and Lake Shore meet the requirements of section 10905(d), take into consideration both the asserted shortcomings of the information provided by BN and the short period of time available to offerers.

On March 16, 1994, BN requested that the Commission reject both OFAs on the grounds that neither OFA is bona fide and that, in the alternative, neither offeror is financially responsible. For present purposes, the significant portions of BN's protest are those declaring the value of the respective segments in light of the two $10.00 offers. BN conceded that the value of the track in both instances is nominal. BN asserts that the disparity in land value between each offer and BN's valuation of each segment is substantial.

(2 continued)
offers $175,000 for all BN interests in the corridor under the Trails Act, and uses this offer as evidence that the segments are worth wore than the $10 that Lake Union and Lake Shore offer for each segment.

Senator Patty Murray, on March 15, 1994, filed a letter protesting offerers' action here on grounds similar to those of SED. She is interested in preserving the corridor for interim trail use and questions the intentions of offerers to actually preserve the corridor for present and future rail service. On March 16, 1994, the certificate of service for that letter was supplemented to show service on offerers' representative.

BN comments first on Lake Shore's offer of $10.00 for the 2,400 foot segment it wishes to purchase.[3] BN responds to Lake Shore's claim that BN did not hold marketable title to the land and asserts that it prepared maps distinguishing good title and reversionary title portions of the right-of-way. BN maintains that from the maps, Lake Shore could have verified the title from county records. Because Lake Shore's OFA allegedly involves right-of-way not being abandoned, BN insists that it is unable to determine the accuracy of the legal advice obtained by Lake Shore, which according to Lake Shore, established that the properties were conveyed by easement only. BN notes that it can say with certainty, however, that the first 2400 feet of the track segment consist substantially of fee title properties and not easement properties. BN asserts that its appraisal report provided to Lake Shore's counsel estimates that a value of properties at issue in the proceeding was $2,445.850.00.[4] BN notes, however, that this estimate does not include nonreversionary properties, the conservative value of which would be $3.9 million. BN asserts that, even conceding Lake Shore's estimate of removal costs at $16,898.50, the total net liquidation value for land and track is far greater than Lake Shore's offer of $10.00.

BN comments next on Lake Union's offer of $10.00 for the 3.12 mile segment it wishes to purchase.[5] BN asserts that it provided values to Lake Union's counsel ranging between $4 million and $7 million. It asserts that it provided documentation indicating that the value of the entire right-of-way was $6.9 million. BN states that a portion of the segment Lake Union wishes to purchase for $10.00 is valued at $2.4 million for nonreversionary properties. BN asserts that, at the very least, after subtracting the costs of track removal (which BN maintains

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[3] BN first asserts that Lake Shore's offer is for a segment of active track not subject to the abandonment proceeding. BN also states that, considering the values of the property, Lake Shore's account balance of $47,866.95 does not support a showing of financial responsibility. BN also questions the meaningfulness of each of the letters of shipper support submitted by Lake Shore.

[4] In its March 7 Letter, BN asserted that the 97,834 square feet of reversionary property would be valued at $2,445,850.

[5] BN asserts that part of the segment Lake Union wishes to purchase is not subject to this abandonment proceeding.

would cost a maximum of $ 1.2 million), the value of the entire segment referred to in Lake Union's offer exceeds $1 million.

The Commission has determined that OFAs to acquire lines for continued rail service need not be detailed. An offeror need only show that it is financially responsible and that its offer is bona fide and reasonable. *ConRail Abandonments Under NERSA*, 365 I.C.C. 472 (1981).

As stated in the February 3 decision, offers of financial assistance under section 10905 take priority over interim trail use/rail banking and public use conditions. Offerers assert that their offers are designed to provide rail service on the respective segments. BN and other parties express substantial doubts that offerers' purpose in attempting to acquire the line segments is to provide rail service. It is not necessary to consider the disputed intent in making a determination here.

Lake Union indicates that it intends to serve existing shippers on the segment and to develop rail traffic from former shippers on that segment Lake Union asserts that it has been in contact with Craftsman Press and Bunge Foods, both existing shippers on the 3.12-mile segment who, it asserts, are supportive of Lake Union's acquisition of the segment for continuation of rail service. Lake Shore submitted expressions of intent to use its rail service by six shippers. Lake Shore emphasizes the importance of expressions by two of those shippers, Foss Maritime Company and Gascoigne Lumber Co , because those shippers assertedly have used BN rail service in the past.[6] Lake Union and Lake Shore, in stating that their offers are legitimate, respond to SED's protest and maintain that it is unfounded

As evidence of its financial responsibility, Lake Union submitted two letters addressed to its counsel indicating that Gordon Blue (Blue) incorporator of Lake Union, has $100,000 in cash on deposit with the investment firm of Ragen, MacKenzie. Lake Union also submitted a letter from Blue asserting that the funds are intended to support Lake

[6] It is noteworthy that several of the shipper support letters mention trackage rights over BN trackage, which are not available under section 10905.

Union's offer to acquire and operate the 3 12-mile segment As evidence of its financial responsibility, Lake Shore submitted a report showing Lake Shore's account balance of $47,866 95 with Smith Barney Shearson. Lake Shore asserts that the balance is in bonds which are readily transferable to cash.

Both Lake Union and Lake Shore assert that their funds are more than sufficient to acquire and operate the respective segments They assert that the acquisition cost of the segments will be minimal both because BN lacks marketable title to the land and because removal and disposal costs exceed the gross value of track materials. Lake Union asserts that approximately two miles of the 3.12-mile segment it wishes to purchase are located in paved streets or parking lots.[7] Offerers assert further that track maintenance and operating costs for its segment would be minimal

Both offerers indicate that they expect operation of the respective segments to be profitable. They contend that SED's allegation that BN's operation of the line was unprofitable is not supported by BN's petition for exemption They continue by asserting that even if BN could not operate the line profitably, this would not be conclusive evidence that offerers could not do so. Lake Shore also refers to the above-mentioned expressions of shipper intent to use its rail service as evidence of a reasonable expectation that operation of the segment will be profitable.

The primary issue here is whether the offers to purchase the line segments are reasonable. BN has not furnished Lake Union and Lake Shore minimum purchase prices as required under OFA procedure (See 49 CFR 1152 27(a)(1)(ii)). But the offers, based on the data provided by BN, are substantially lower than any minimum purchase price BN could reasonably be expected to consider. The offerers have not adequately justified this discrepancy. BN has provided a reasonable basis to support a

[7] It notes that the 1991 cost for track removal and street rights-of-way restoration on the line involved in the present proceeding was $1,258,035 and asserts that the cost would be such higher in 1994. Lake Union estimates that the gross salvage value of the track materials in the 3.12-mile segment is $85,095.

substantial value for each segment. In order to justify their nominal offers, the offerers would have to offer a reasonable basis upon which I could make a finding that the real property is worthless. But the offerers have submitted only bare assertions to support their conclusions. That does not suffice. Thus, the OFAs are insufficient to start negotiations.

Lake Union and Lake Shore have not adequately explained the basis for the disparity of their offers and BN valuation of the segments as required by 49 U.S.C. 10905(c) and 49 C.F.R. 1152.27(c)(2)(ii). Accordingly, the offers are found not to be bona fide and reasonable to initiate negotiations between the parties.

Under 49 C.F.R. 1152.27(e)(2), the Commission's initial decision upon review of an OFA in an exemption proceeding is to be issued within 35 days of the publication or 5 days after the offer is filed if the time for filing has been tolled. Because the time for filing OFAs was tolled here and the OFAs were filed March 11, 1994, the decision is to be issued by March 16, 1994, only 3 working days after the filing date. This proceeding involves some unusual and complex allegations concerning the validity of the OFAs. Nevertheless, the record as now made warrants the findings being made under the delegation of authority at 49 CFR 1011 8(c)(2), the Director of the Office of Proceedings makes the initial determination whether offers of financial assistance satisfy the standards of section 10905(d) for purposes of partial revocation and negotiation. Appeals of the initial decisions making such determinations will be acted upon by the entire Commission under the revised rule being codified at 49 CFR 1011 2(a)(7).[8] The effective date of the exemption will be extended for an additional 30 days to allow for consideration of an appeal of this order.

This action will nor significantly affect either the quality of the human environment or the conservation of energy resources.

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[8] See *Delegation of Authority--Technical Amendments*, 9 I.C.C. 2d 652.658.668 (1993) for the revised text of the applicable rules. The revised appeal rule at 49 CFR 1011 2(a)(7) states "All appeals of initial decisions issued by the Director under section 1011 8(c). Appeals must be filed within 10 days after service of the Director decision or publication of the notice, and replies must be filed within 10 days after the due date for appeals or any extension thereof."

It is ordered:

1. Lake Union's and Lake Shore's OFA's are found not to be bona fide.

2. The effective date of the exemption is extended to April 22, 1994.

3. This decision is effective on its service date.

By the Commission, David M. Konschnik, Director, Office of Proceedings.
Sidney L.Strickland, Jr
Secretary.

APPENDIX E

BEFORE THE
INTERSTATE COMMERCE COMMISSION

BURLINGTON NORTHERN RAILROAD)
COMPANY -- ABANDONMENT EXEMPTION)
-- IN KING COUNTY, WA)
DOCKET NO. AB-6 (SUB-NO. 357X))

OFFER OF FINANCIAL ASSISTANCE

SEATTLE, LAKE SHORE AND EASTERN
RAILROAD, INC.
622 West Ewing Street
Seattle, WA 98119
Offeror

THOMAS F. McFarland, JR.
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DUE DATE: March 11, 1994

OFFER OF FINANCIAL ASSISTANCE

Pursuant to 49 U.S.C. 10905(c) and 49 C.F.R. section 1152.27(c)(2)(ii)(B), SEATTLE, LAKE SHORE AND EASTERN RAILROAD, INC. ("SLSE") hereby offers to purchase for $10 the portion of the rail line involved in this proceeding between Engineering
Station (ES) 267+00 and ES 243+00, a distance of 2,400 feet (.45 miles) in King County, WA ("the 2,400-foot segment").[1/]

1/ The rail line was described by means of "ES" references in the Petition for Exemption in this proceeding. Milepost references for the segment to be acquired are unknown to SLSE.

PROCEDURAL BACKGROUND

Notice of the exemption for abandonment of the involved rail line was published in the Federal Register on February 4, 1994 (59 F.R. 5443).

On February 11, 1994, SLSE timely filed a formal expression of intent to file an offer of financial assistance (OFA), along with a request that Burlington Northern Railroad Company (BN) provide all information required by 49 C.F.R. 1152.27(a)(1)(ii), (2) and (3), specifically directed to the 2,400-foot segment. On February 28, 1994, SLSE timely filed a petition to toll the 30-day period for submitting OAFS in view of BN's failure to have provided the requested information. By decision served March 3, 1994, the Commission extended the time for submitting OAFS until 10 days after the service date of that decision, i.e., until March 13, 1994, a Sunday. By virtue of 49 C.F.R. _ 1152.25(d)(4), OAFS thus are required to be filed on or before Friday, March 11, 1994.

On March 8, 1994, counsel for SLSE received the following from BN: (1) a letter from counsel for BN; (2) a single sheet headed "value of materials - Lake Union and Terry Avenue Lines"; (3) a real estate appraisal; and (4) valuation maps colored to indicate the claimed nature of BN's title to land. The letter from counsel for BN indicates that a copy of the letter (and presumably the other materials) was sent to the Commission. None of the information thereby furnished was specifically directed to the 2,400-foot segment, as requested, but instead it relates to the entire rail line without separation between the 2,400-foot segment and the remainder of the line. Contrary to 49 C.F.R. 1152.27(a)(1)(ii), (2) and (3), BN did not identify a minimum purchase price for the 2,400-foot segment; did not provide a recent report on the physical condition of that segment; and did not estimate the net liquidation value of that segment.

In considering whether or not SLSE's offer satisfies the requirements of 49 U.S.C. 10905(d), the Commission is requested to take into account the shortcomings of the information furnished by BN in relation to the requirements of the regulations, and the short period of time available to SLSE for analysis of that information.

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LEGITIMACY OF OFFER

In a letter dated March 3, 1994, Seattle Engineering Department ("Seattle") has protested SLSE's offer in anticipation of its filing. Seattle notes that SLSE was incorporated by Mr. Richard Welsh ("Welsh"), who is Executive Director of the National Association of Reversionary Property Owners ("NARPO"). Seattle notes that NARPO has been in the forefront of legal and political efforts to prevent preservation of abandoned railroad rights-of-way for trail purposes. Seattle states that SLSE may be a ploy by Welsh to prevent the preservation of rail corridors for trail purposes.[2/] Seattle expresses concern that if Welsh (through SLSE) is allowed to purchase the rail line, any group opposed to preservation of rail corridors for trail purpose could incorporate as a rail company and buy the corridor in a "land grab".

Offers of financial assistance to acquire rail lines under 49 U.S.C. 10905 take priority over interim trail use of corridors because retention of rail service is mandatory under 10905, whereas trail use under 16 U.S.C. 1247(d) is voluntary. *Rail Abandonments - Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 608 (1986). Therefore, if SLSE's offer to acquire the 2,400-foot segment is legitimate (i.e., if the offer if for the provision of rail service on the line), it takes priority over Seattle's desire to make use of that segment for trail purposes.

SLSE's offer to purchase the 2,400-foot segment of line is legitimate because it is designed to provide rail service on that segment. Attached to this offer are the following expressions by shippers of intent to use SLSE's rail service:

Appendix 1 -Foss Maritime Company
Appendix 2 -Gascoigne Lumber Co.
Appendix 3 -Miller & Miller Boatyard Company
Appendix 4 -Marine Construction and Supply
Appendix 5 -D&M Seeker Corp.
Appendix 6 -Coastal Transportation, Inc.

[2/] Seattle's letter actually refers to a railroad other than SLSE, but it is clear in context that reference to SLSE was intended.

The expressions by Foss Maritime and Gascoigne Lumber of intent to use SLSE s rail service are especially meaningful because such expressions show that both of those companies have used BN rail service in the past.[3/]

The legitimacy of SLSE's offer having been established by those expressions of shipper intent to use its rail service, the prior activity of Welsh or NARPO in regard to recreational trails is wholly immaterial
in the present case. Also immaterial is that SLSE's rail use of the segment may prevent trail use by Seattle. It is thus not appropriate to refer to SLSE's acquisition as a "land grab" as does Seattle, but if it is so considered it is a "grab" that is specifically authorized by the applicable statutes.

For the foregoing reasons, Seattle's protest should be denied.

FINANCIAL RESPONSIBILITY

As evidence of SLSE's financial ability to acquire and operate the 2,400-foot segment, there is attached to this offer as Appendix 7 a report showing SLSE's account balance of $47,866.95 with Smith Barney Shearson, 999 Third Ave., Suite 3800, Seattle, WA 98104, (206) 344-3500, c/o Jim Nicholson, as of February 1, 1994. (Account Number 887-02990-16 570). That balance is in bonds which are readily transferable to cash, as can be verified by Mr. Nicholson.

That amount is more than ample to acquire the 2,400-foot segment and operate it. As appears in the following subsection of this offer, the evidence indicates that the acquisition cost of the segment will be nominal, i.e., most likely $10 because BN lacks marketable title to the land and removal and disposal costs exceed the gross value of track materials; at worst, the acquisition cost would be $3,484. Track maintenance and operating costs for the short 2,400-foot segment would be minimal. In view of expressions of shipper intent to use SLSE's rail service, SLSE has a reasonable expectation that operation

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[3/] Some of the shipper support letters mention trackage rights for SLSE. SLSE intended to seek trackage rights over BN, but counsel has advised SLSE that trackage rights are not available under 10905.

of the segment will be profitable.[4/] Thus, SLSE's account balance will be sufficient to provide funds necessary for acquisition of the 2,400-foot segment and working capital for maintenance and operations.

REASONABLENESS OF OFFER

SLSE's offer to acquire the 2,400-foot segment for $10 is reasonable so as to warrant initiation of negotiations for acquisition of the segment. As shown below, differences between SLSE's offer and BN's probable valuation of the segment are adequately explained (as noted, BN has not provided a specific valuation for the segment).

1. *Land*

SLSE has not placed a value on the land in the segment because BN does not have marketable title to that land. SLSE has received a legal opinion from a Bellevue, Washington attorney with extensive experience in interpretation of instruments conveying interest in real property to railroads that concludes that the two instruments by which BN acquired the right to use the land in the segment conveyed easements for railroad purposes under Washington law. Such segments are not considered to be equivalent marketable title, and thus are not entitled to consideration in the determination of net liquidation value under 49 U.S.C. 10905. *Chicago and North Western Transp. Co.Abandonment*, 363 I.C.C. 956, 959 (1981).[5/] In contrast, the material recently furnished by BN does not contain any support for BN's contention that it has marketable title to some or all of the land in

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[4/] Seattle's protest contends (p. 2) that BN's operation of the line has been unprofitable. BN's petition for exemption contained no such showing. Even if it did, the Commission has recognized that shortline railroads like SLSE often can operate rail lines profitably that could not be operated profitably by Class 1 rail carriers because of their higher cost structures. See *Class Exemption to Acq. & Oper. of R. Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810, 813 (1985). Moreover, if BN operation of the entire rail line was unprofitable, it does not follow that SLSE's operation of the 2,400-foot segment would be unprofitable.

[5/] Even id BN had marketable title, it has agreed to convey a 30-foot wide corridor out of that land to Seattle solely in exchange for Seattle's removal of trackage and restoration of streets in the segment. (Trail Implementation Agreement between BN and Seattle, dated September 23, 1991, pp. 2-5). The remaining width of that property is leased to third parties for indefinite terms at modest rental.

the segment.[6] Specifically, the authors of the real estate appraisal furnished by BN disclaim any knowledge of the quality of BN's title to land in the segment. BN did not provide nor refer to any legal opinion that purports to establish that BN has marketable title to the land under Washington law.[7]

2. *Track Materials*

SLSE has not placed a value on the track materials in the segment because the cost of removing such track materials and disposing of scrap crossties exceeds the value of such track material (i.e., the track materials have a negative net salvage value). SLSE has received a valuation report from an experienced firm specializing in rail line repair, removal and rehabilitation that concludes that track materials in the segment have a net salvage value of $3,484, without consideration of costs for disposal of scrap crossties. That report takes into account the specific condition of the track materials. SLSE also has received a report from an experienced firm specializing in disposal of environmentally sensitive waste products, including crossties, that concludes that it would cost $16,898.50 to dispose of scrap crossties in the segment. It can thus be seen that total costs for removal and disposal would exceed the value of the materials.

In contrast, BN has not provided an estimate of net salvage value of track materials that is specific to the 2,400-foot segment. BN has not provided a recent report of the physical condition of the track materials in that segment. No support of any kind was provided for the valuation of track materials in the single sheet that BN provided headed "value of materials." The values in that sheet are not credible. Rail and OTM weighing 90 and 100 pounds per yard are assigned an unreasonably high value of $215 per ton, apparently as reusable material, but that is contradicted by BN's characterization of the condition of the line as poor, with broken rails, in its petition for exemption (p. 4).

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[6] The only indication the BN claims such marketable title is yellow coloring on the valuation map of the segment.

[7] The authors of the real estate appraisal provided by BN referred to an earlier trail use agreement between BN and Seattle (pp. 5-6), but did not make reference to the 1991 agreement nor take that agreement into account in valuing the rail line.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Commission should find:

(1) that SLSE's offer is a legitimate offer for the provision of rail service on the segment;

(2) that SLSE has sufficiently established its financial capability to acquire and operate the segment; and

(3) that SLSE has sufficiently established the reasonableness of its offer and has adequately explained the differences between its offer and BN's valuation of the segment.

Based upon these findings, the Commission should:

(1) deny Seattle's protest;

(2) accept SLSE's offer for filing; and

(3) postpone the effectiveness of the exemption for abandonment pending negotiations for acquisition of the segment.

Respectfully submitted,

SEATTLE, LAKE SHORE AND EASTERN
RAILROAD, INC.
622 West Ewing Street
Seattle, WA 98119
Offeror
THOMAS F. McFarland, JR.
BELNAP, SPENCER, McFarland & HERMAN
20 North Wacker Drive
Suite 3118
Chicago, IL 60606-3101
(312) 236-0204

Attorney for Offeror
DUE DATE: March 11, 1994

APPENDIX F

CHARLES H. MONTANGE
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(206)546-1936
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14 March 1994

The Honorable Sydney Strickland, Jr.
Secretary, Interstate Commerce Commission
12th & Constitution Ave., N.W.
Washington, D.C. 20423

Re: Burlington Northern Railroad Abandonment Exemption -AB-6 (Sub-no. 357X) Request to Reject or Investigate Offer of Financial Assistance submitted on behalf of Seattle, Lake Shore and Eastern Railroad

Dear Mr. Strickland:

This letter is on behalf of Rails to Trails Conservancy (RTC), a nation-wide non-profit dedicated to the preservation of otherwise-to-be-abandoned rail corridor for future rail reactivation, interim use as trails, and other compatible public purposes.

In the above-referenced proceeding, Burlington Northern (BN) has sought the abandonment of a segment of line defined as ES 267+00 and ES 243+00 (the "2400 foot segment") and ES 118+ 28.7 = 6+60.3 and ES 34.55.2, a distance of 3.12 miles in downtown Seattle, King County, Washington.

The line has had very few shippers in recent years. It is in poor condition, according to the railroad, and basically may only be operated at night because people park cars on it during the day. No shipper opposed the abandonment. The City of Seattle expressed interest in preserving the line for future rail use and in the interim, using the line as a trail. As an interim trail, the line would tie into the City's Burke-Gilman Trail, one of the most popular linear parks and

trails in the United States. With BN's consent, the Commission issued a notice of interim trail use under 16 U.S.C. 1247(d) and applicable regulations.

Although no shipper opposed abandonment, two organizations represented by my learned acquaintance (and friend) Tom McFarland have filed "offers of financial assistance" (OFA's) invoking 49 U.S.C. 10905. The first OFA, relating solely to the 2400 foot segment, was submitted on behalf of Seattle, Lake Shore and Eastern Railroad, Inc. ("SLSER"), and the second was submitted by Lake Union Terminal Railroad Company ("LUT").

Mr. McFarland has acknowledged to me that SLSER is Richard Welsh. Mr. Welsh, in turn, is the Executive Director of the National Association of Reversionary Property Owners (NARPO). Mr. Welsh and NARPO have a long track record of opposing corridor preservation, and favoring the disassembly of rail corridors; with parcelization to adjacents. We attach herewith a letter dated March 11, 1988, by Mr. Welsh discussing his basic approach and strategy, as well a *Seattle Weekly* article, dated February 8, 1989, entitled "Trail Buster," discussing Mr. Welsh's activities on a national basis.

Rails to Trails Conservancy is concerned that Mr. Welsh's invocation of 49 U.S.C. 10905 is merely a subterfuge to obtain control over the right of way and then facilitate its fragmentation. According to information provided RTC by BN, at most only one of the alleged shippers whose letters are appended to Mr. Welsh's OFA has shipped on the line, and the volume of that shipper (evidently only four carloads at the time of the abandonment) is too light to sustain even a fragment like this, and may have been contrived. All entities supplying letters to Mr. Welsh (with the possible exception of one business which may not be located on the corridor) may be adjacents hoping to benefit from reversions. The OFA filed on behalf of Mr. Welsh notes Mr. Welsh's position that the corridor is reversionary. Mr. Welsh, after failing to provide rail service, could abandon after two years and allow the property to revert if that were so. Seen in this light, the City of Seattle's plan to keep the corridor intact under 16 U.S.C. 1247(d) is much more consistent with future rail service than anything Mr. Welsh has to offer.

In any event, both LUT and SLSER have offered only $10 for the corridor. As we understand the situation, BN indicates that the appraised value of the fee-owned parcels in the corridor exceeds $4 million -- vastly more than the $10 OFA's. This alone calls into question whether the offering parties are "financially responsible" as required by the statute and regulations in the sense of being able to acquire and to operate the corridor.

According to the OFA papers, LUT have maximum available assets of about $100,000[1] and SLSER has a net worth of $47,865.[2] The net worth of both LUT and SLSER thus appears to be no greater than $150,000 combined.

RTC is prepared to offer, and hereby does offer, a price of $175,000 for all BN interests in the corridor, including $65,000 for the portion of the "2400 foot segment" of interest to SLSER and $110,000 for the remainder of the corridor. Our offer is contingent upon negotiation of a mutually approved definitive contract under 16 U.S.C. 1247(d), with the standard kinds of terms and conditions ordinarily included in RTC-BN contracts, and the confirmation through an appropriate environmental survey that toxic conditions do not exist in the corridor, and, of course, compliance with any applicable state and local requirements. We are prepared to keep this offer open for 30 days.

The amount of RTC's offer demonstrates beyond cavil for purposes of the OFA's that the value of the corridor (including the 2400 foot segment) exceeds $10, in that RTC is willing to pay an amount considerably in excess. Furthermore, the amount of RTC's offer exceeds the net worth of each of the companies (or both companies combined) making OFA's. Under 49 U.S.C. 10905, and ICC's implementing regulations, this Commission must find an offering party submitting an OFA to be "financially responsible." The offering parties are clearly not financially responsible if their evidence of assets (let alone net worth) shows they are worth less than an actual offer BN has in hand for the property. Here, the total reported assets of the two

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[1] See Ragen MacKenzie letter reciting $100,000 cash balance attached to LUT OFA.
[2] See Smith Barney report attached to SLSER OFA.

offerers combined does not exceed a good faith offer BN has in hand for the property. The Commission does not even have to address the appraised value BN has for this line (over $4 million) to reach this conclusion; the pending offers of financial assistance should be rejected on the ground that the tendering parties are not "financially responsible."

Rails to Trails Conservancy is prepared to cooperate to with the City of Seattle, the local communities, and Burlington Northern Railroad to preserve the integrity of these two rail corridors.

ICC should reject the pending OFA's for lack of responsibility, or at least investigate the matter, for the reasons stated herein.

Respectively submitted,
signature
Charles H. Montange
426 NW 162nd St. Seattle, WA 98177
(206) 546-1936
counsel for Rails to Trails Conservancy

Encls.
cc. Simon Eristoff, Esq. (Rails to Trails Conservancy)
(w/encl.)
Peter Lagerway (Seattle Engineering Dept.) (w/ encl.)

Certificate of Service

I hereby certify service of the foregoing this 15th day of March, 1994, upon Sarah Whitley, Esq., BNRR, 3800 Continental Plaza, 777 Main St., Ft. Worth, TX 76102; and Thomas McFarland, Esq., Belnap, Spencer, McFarland & Herman, 20 North Wacker Drive, Suite 3118, Chicago, IL 60606.
signature of Charles Montange

Appendix G1

Interstate Commerce Commission

Decision

Docket No. 307 Sub No. 2X

Wyoming and Colorado Railroad Co., Inc.-

Abandonment Exemption-Jackson, County, Co.

In the Matter of a Request to Set Terms and Conditions

Decided September 14, 1995

Served September 15, 1995

By a decision served and notice published on May 16, 1995, the Commission, under 49 USC 10505, exempted from the prior approval requirements of 49 USC 10903-04 the abandonment by the Wyoming and Colorado Railroad Company, Inc., (WYCO or the railroad) of a 27.03 mile segment of its Coalmount Branch between milepost 67.47 at the Colorado/Wyoming State Line, and the end of the line at milepost 94.5, near Walden, in Jackson County, Co. On May 30, 1995, the State of Colorado (Colorado or the state) filed a formal expression of intent to file an offer of financial assistance (OFA). Subsequently, on June 16, 1995, Colorado filed its OFA.

In a decision served June 22, 1995, the Director of the Office of Proceedings found the offeror financially responsible and the offer bona fide and reasonable to initiate negotiations between the parties. The decision also postponed the effective date of the exemption authorizing abandonment pending completion of the financial assistance procedures and indicated that, if the parties could not agree on terms, either party could request the Commission to establish the terms and conditions of a subsidy or purchase.

On July 17, 1995, Colorado requested that the Commission establish the conditions and compensation for a (1) 1-year subsidy and (2) for a subsequent purchase of the subject line. On August 4, 1994, WYCO replied, and on August 16, 1995, Colorado filed a rebuttal.

Discussion and Conclusions

Subsidy and purchase issues. Colorado's request that we establish both a subsidy (for a period of 1 year) and a purchase price to be applicable at the close of the subsidy period is novel. Offerors customarily ask that we establish either a subsidy or purchase price. WYCO argues that the Commission may establish either one or the other, but not both.

WYCO argues that there is no statutory authority for such an action on the grounds that "[s]ection 10905 does not provide for a subsidy followed by an acquisition." WYCO's reading of the statute is too narrow. Section 10905 authorizes the Commission to set both the terms of a sale and the terms of a subsidy. WYCO describes our powers at section 10905 as "exceptional" which must be construed "narrowly". It is true that section 10905 is a condemnation provision, and must be administered to avoid any violation of the constitutional prohibitions on takings without compensation. But WYCO has not shown how it would be prejudiced by receiving compensation first in one statutorily sanctioned form and then in another. We see not statutory or constitutional prohibition against such a procedure, as long as it is administered reasonably.

It may be that an offeror requires a period of time to acquire the resources to purchase the line, but is able to pay the subsidy amount until then. Public bodies such as Colorado

(end of page 1 of decision)

are deemed to be financially responsible by section 10905. Their ability to put together the purchase price may in fact require some time, inasmuch as government entities often do not have substantial sums available that have not been appropriated for specific purposes. Allowing such offerors to maintain a line by subsidy and to subsequently acquire it by purchase thus would serve a useful purpose. As long as the subsidy price and the purchase price are correctly calculated, the railroad would suffer no injury from such a procedure. Indeed, our rules currently provide for staggered consideration of multiple offers to purchase a line and for successor subsidy agreements. 49 USC 1152.27(j)(1).

WYCO also argues that the Colorado proposal results in delay in the closing of an acquisition beyond the 90-day period after the decision setting the terms and conditions customarily required by this agency. That argument fails to recognize that we require a reasonably prompt closing so that the railroad can receive compensation. Under Colorado's proposal, WYCO would receive the subsidy amount for the period before the acquisition. WYCO cannot successfully argue that it is being injured under such a procedure.

Allowing Colorado to initially propose a subsidy, to be followed by a purchase, within a reasonable amount of time, not only makes good economic sense for everyone involved, but it is also consistent, we believe, with the forced condemnation pursuant only to just compensation intended purposes of the Act. In other words, as long as

the interim subsidy price and subsequent purchase price are reasonably calculated, such a bifurcated offer of financial assistance should not generally adversely effect the value of a railroad's property rights.

Here the State of Colorado's two-prong offer of financial assistance does not worsen WYCO's current financial position vis-a-vis this currently unused and otherwise "abandonable" rail line. Simply put, while the bifurcated form of financial assistance here gives rise to the possibility of continued rail line maintenance and service, for at least another year, it does so not at WYCO's expense, but rather at the expense of the State of Colorado.

Finally, WYCO argues that the purchase price must be the price at the time of closing, and a price set a year in advance cannot meet that requirement. WYCO's argument has some merit. However establishing a purchase price now will afford both parties a substantial measure of guidance in planning for the acquisition 1 year hence, we will resolve the disputes raised by the parties and set the price now. The factors that might change over the course of 12 months should not be extensive. We will establish the purchase price subject to the condition that Colorado must notify WYCO and us 90 days prior to its intended consummation of the purchase and that such notification must occur no later than 1 year from the service date of this decision.[1] WYCO may then file a petition within 30 days within receipt of notice to adjust any terms of the purchase price in light of changes that occur subsequent to the date of record before us now. WYCO should not use this process to seek reconsideration of the terms of this decision but rather to supplement the record with new evidence that would effect the purchase price.

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[1] We normally allow 90 days for closing from the service date of a decision setting the terms and conditions for the sale of the line under section 10905.

(end of page 2 of decision)

(pages 3-5 of decision not included due to decision arriving on date of printing of this Writ)

(top of page 6 of decision)

the line 8 years ago. Finally, Colorado states that in no event should the purchase price exceed $1, 423,189, the amount that the State computes to be the NLV.

The State notes that in the recent case before the CBAA, WYCO argued that the subject line had an actual value not greater than $427,086 in 1993 dollars. The State notes that this figure is similar to its estimate using the line's original purchase price.

The State also contends that WYCO's purchase price for the property is a valid indicator if its current value. Colorado argues that the liquidation value of the line after 8 years of service should be no greater than its going concern value when initially purchased. The State believes that the going concern value should set the upper limit on the line's current NLV in order to avoid unjust enrichment of the purchaser. The State notes that the NLV is more than three times the price WYCO paid for the line 8 years ago.

Finally, the State contends that, at most, the NLV of the line should not exceed $1, 443,411 , consisting of a net salvage value of $1,364,244 and a land value of $79,167. The State bases its track material quantities on an on-site inspection and track charts. Colorado's NLV is computed as follows:

Net salvage value		$1,364,244
	gross salvage value -$2,037,194	
	removal costs - 672,950	
Land		79,167
NLV		$1,443,411

WYCO agues that the NLV for the line is $2,775,898. WYCO notes that the Commission included in its decision served May 19 that the NLV for the line is $2,665,417. As an indicator of reasonableness, WYCO also submits a recent offer of $2,666,000 for all track materials and real estate from a railroad salvage company, A&K Railroad Materials.[6]

WYCO reliance on the offer of A&K is misplaced. As WYCO notes at page 15 of its reply we have held that an executed sales contract is the best evidence of NLV: See Portland Traction Company--Abandonment Exemption--In Multnomah And Clackamas Counties, Oregon, AB-225 (Sub-No. 2X) (ICC served Jan. 10, 1990) (Portland Traction). WYCO has not executed such a contract with A&K, but has merely procured an offer which the railroad seeks to use as the basis for determination of NLV. But we have only accepted that evidence where it "demonstrated a significant understatement in the offeror's appraisal", Portland Traction at 5, or where the evidence showed that "(t)he railroad already

[6] The State argues that A&K's offer is not the best indicator of the line's value because WYCO has nor accepted the offer.

has a firm commitment for the purchase of the line at a price substantially higher than salvage value". Washington & Old Dominion R. Abandonment--Virginia, 331 ICC 587, 600 (1968). Here, the A&K

(end of page 6 of decision)

offer closely parallels the adjusted NLV we have determined bases on the evidence of scrap and real estate values which we have reached based on the submissions of Colorado and WYCO, differing only $50 thousand in a valuation of $2.61 million.

Before we would find that an offer from a third party would constitute the basis for a determination of NLV, especially in the face of a conflicting evaluation, we need more information about the offer, particularly if, as here, it has been made in the course of the section 10905 proceeding. We would normally not expect to see such offers without significant contingencies. Such an offer could not prevail if the person invoking section 10905 accepted the terms and conditions set by the Commission. We do not wish to determine NLV based on an offer made in the knowledge that the offeror would not actually have to pay the purchase price. The opportunity for receiving inflated offers as evidence of NLV is too great for us to adopt such a practice. A&K's offer is dated July 18, 1995, the day after Colorado submitted its request to set terms and conditions and 26 days after the Commission found Colorado's offer to WYCO to be bona fide, thus triggering the section 10905 process. Under these circumstances, we would need more information about the offer than supplied by WYCO before we could accept it as the basis for a finding of NLV. That is especially true in light of the evidentiary submissions we have received from both parties as to salvage value. . . . .

(pages 8-10 of decision not included as decision arrived on date of printing of this Writ)